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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and PACIFIC MARITIME ASSOCIATION,
Petitioners,

VS.

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, CALIFORNIA CARTAGE COMPANY, INC., CONTAINERFREIGHT TERMINALS COMPANY, and HAWAIIAN PACIFIC FREIGHT FORWARDING,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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92 pp

STATEMENT OF THE QUESTIONS PRESENTED

Petitioner-labor organization experienced a severe decline in its work force and a loss of about 75% of its traditional marine container cargo stuffing work to non-ILWU facilities like Respondents'. It attributed this to petitioner-employers association's allocation of high fringe costs to labor intensive container stuffing operations. In collective bargaining it compelled the employers to reduce those fringe costs by reallocating them to container tonnage. Respondent companies, competing low labor cost employers which performed the same work outside the bargaining unit, which paid none of the fringe costs and which had no contract with the union, filed complaints before the Federal Maritime Commission pursuant to the Shipping Act as amended by the Maritime Labor Agreements Act of 1980, 46 U.S.C. §§ 801, 814 Fifth Paragraph to set aside the petitioners' labor contract.

On the basis of statutory language and legislative intent, the FMC held that competitors seeking to impose higher labor costs in a bargaining unit other than their own had no standing to attack petitioners' labor contract. Respondent companies' business interest in having competing employers continue to experience high labor costs did not constitute an interest protected by a statute designed to afford a remedy only to shippers, carriers or ports who pay fringe costs assessments. The Court of Appeals for the Ninth Circuit reversed, permitting the competitors to seek to show that the labor contract was "detrimental to commerce" as that term is used in 46 U.S.C. § 814, Fifth Paragraph.

The questions presented are:

1. Whether entities whose economic interest is keeping competitors' labor costs high have standing to sue to upset a collective bargaining contract and, through the Commission's processes, to impose higher fringe costs in another

bargaining unit under the "detriment to commerce" language contained in section 15 of the Shipping Act, 1916, (46 U.S.C. § 814, Fifth Paragraph).

2. Whether entities which are not "carriers, shippers or ports" and which are not required to pay, and do not pay, any of the assessments imposed by a collectively-bargained "assessment agreement" have standing to attack that agreement under the Maritime Labor Agreements Act of 1980. (46 U.S.C. §§ 801, 814, Fifth Paragraph and 814c).

LIST OF PARTIES AFFECTED
(U.S. Sup. Ct. Rule 28.1)

a. California Cartage Company, Inc.
b. Containerfreight Terminals Company
c. Hawaiian Pacific Freight Forwarding
d. United States of America
e. Federal Maritime Commission
f. International Longshoremen's and Warehousemen's Union
g. Pacific Maritime Association, a corporate association whose membership consists of:

1. A & D Transport, Inc.
2. Agrex Stevedore, Inc.
3. Alltrans Express U.S.A., Inc.
4. American Bulk Loading Enterprise, Inc.
5. American President Lines, Ltd.
6. Anacortes Stevedoring Company
7. Associated Banning Company
8. Barber Lines
9. Beaufort Terminals, Inc.
10. Bellingham Stevedoring Company
11. Benicia Port Terminal Company
12. Blue Star Line, Inc.
13. Brady-Hamilton Stevedore Co.
14. California Stevedore & Ballast Co.
15. California United Terminals

16. Canadian Transport Company
17. CFS Corporation
18. Container Services of Washington, Inc.
19. Container Stevedoring Co., Inc.
20. Cooper/T. Smith Stevedoring Co., Inc.
21. Crescent City Marine Ways & Drydock Company, Inc.
22. Crescent Wharf & Warehouse Co.
23. Diablo Service Corporation
24. Eagle Marine Services, Ltd.
25. East Asiatic Co., Inc., The
26. Eller & Company, Inc.
27. Everett Stevedoring Company
28. Fibrex & Shipping Co., Inc.
29. Flota Mercante Grancolumbiana, S.A.
30. Forest Terminals Corporation
31. Foss Alaska Line, Inc.
32. General Steamship Corporation, Ltd.
33. Greenleaf Distribution Services
34. Hapag-Lloyd Agencies
35. Hoegh Lines
36. Husky Terminal & Stevedoring, Inc.
37. Indies Terminal Company
38. I.T.O. Stevedoring Corporation
39. International Shipping Co., Inc. (Portland, Oregon)
40. International Shipping Co., Inc. (Seattle, Washington)
41. International Transportation Service, Inc.
42. Interocean Steamship Corporation
43. Italian Line
44. Johnson Line
45. Jones Oregon Stevedoring Company
46. Jones Washington Stevedoring Company
47. K & W Enterprises
48. KKL Kangaroo Line
49. Kawasaki Kisen Kaisha, Ltd.

50. Kerr Steamship Company, Inc.
51. Korea Shipping America Inc.
52. Liebers Industries, Inc.
53. Long Beach Container Terminal, Inc.
54. Los Angeles Container Terminal Co., Inc.
55. Maersk Line Agency
56. Marine Terminals Corporation
57. Marine Terminals Corporation of Los Angeles
58. Matson Navigation Company
59. Matson Terminals, Inc.
60. Merit Steamship Agency, Inc.
61. Metropolitan Stevedore Company
62. Mitsui O.S.K. Lines, Ltd.
63. National Galleon Shipping Corporation
64. National Lines Bureau, Inc.
65. National Metal & Steel Corporation
66. Nedlloyd Lines
67. Neptune Orient Lines, Ltd.
68. Nippon Yusen Kaisha
69. Noonan, Fred F. Company, Inc.
70. Norsk Pacific Steamship Co., Ltd.
71. Northwest Marine Services Co.
72. Oakland Container Terminal Co., Inc.
73. Olympia Stevedoring Company, Inc.
74. Olympic Steamship Company, Inc.
75. Oregon Ship Terminal, Inc.
76. Oregon Terminal Company
77. Overseas Shipping Company
78. Pacific, Atlantic & Gulf Stevedores, Inc.
79. Pacific Australia Direct Line
80. Pacific Automobile Terminal Co.
81. Pacific Bulk Loading, Inc.
82. Pacific Coast Terminals, Ltd.
83. Pacific Europe Express
84. Pacific Islands Transports Line
85. Pacific Northwest Auto Terminals
86. Pacific-Oriental Terminal Co.

87. Paco Terminals, Inc.
88. Pasha Maritime Services, Inc.
89. Portland Lines Bureau
90. Port of Astoria
91. Port of Kalama
92. Port of Vancouver
93. Reliable Line Service
94. Richmond Stevedoring Company, Inc.
95. Rogers Terminal & Shipping Corp.
96. San Francisco Stevedoring Co., Inc.
97. Seacon Terminals, Inc.
98. Sea-Land Service, Inc.
99. Seapac Pacific Services, Inc.
100. Sea Star Stevedore Company
101. Seattle/Crescent Container Service
102. Seattle Stevedoring Company
103. Showa Line, Ltd.
104. Sierra Allied Contractors, Inc.
105. Southern Stevedoring Company, Inc.
106. Star Terminal Company, Inc.
107. Jacob Stern & Sons, Inc.
108. Stockton Stevedore & Warehouse Co.
109. Tacoma Line Handling Company
110. Tokai Shipping Company. Ltd.
111. Tomden, Inc.
112. Transpac Terminal Services
113. Transpacific Transportation Company
114. Twin Harbor Stevedoring Company
115. United States Lines, Inc.
116. Western Rim Ltd.
117. Western Stevedore & Terminal Co., Inc.
118. Westfall Stevedore Company
119. Williams, Dimond & Company
120. Yamashita-Shinnihon Steamship Company, Ltd.
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INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and PACIFIC MARITIME ASSOCIATION,
Petitioners,

VS.

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, CALIFORNIA CARTAGE COMPANY, INC., CONTAINERFREIGHT TERMINALS COMPANY, and HAWAIIAN PACIFIC FREIGHT FORWARDING,
Respondents.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[1]The caption of the case contains the names of all parties to the proceeding in the Court below. U.S. Sup. Ct. Rule 21.1(b).

Petitioners, International Longshoremen's and Warehousemen's Union ("ILWU") and Pacific Maritime Association ("PMA"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above entitled proceedings on December 12, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 721 F.2d 1199 and at 22 SRR 583 and is printed in Appendix A. The Order of the Court denying rehearing is printed in Appendix B. The Report and Order of the Federal Maritime Commission ("FMC") is reported at 21 SRR 1533 and is printed in Appendix C.

JURISDICTION

The opinion of the Court of Appeals was filed and entered on December 12, 1983. Petitioners' timely petition for rehearing, which was joined in by the FMC, was denied on March 2, 1984. This Court has jurisdiction pursuant to § 1254(1) of Title 28 of the United States Code.

STATUTE INVOLVED

This case involves the interpretation and construction of the Shipping Act, 1916, 46 U.S.C. § 801, et seq., as amended by the Maritime Labor Agreements Act of 1980, 94 Stat. 1021 (codified at 46 U.S.C. §§ 801, 814 and 841c) ("MLAA"). The MLAA is printed in Appendix D.

STATEMENT OF THE CASE

A. Petitioners Attempt to Deal in Collective Bargaining With Problems Relating to the Loss of Longshore Work Due to Containerization

Petitioner ILWU is a labor organization and petitioner PMA is a multi-employer association which together engage in collective bargaining in the stevedoring industry on the west coast of the United States. For many years the impact of containerization on the work opportunities of

longshoremen[2] has been the subject of extensive bargaining between ILWU and PMA.[3] A major area of ILWU concern has been the stuffing and unstuffing of containers ("CFS work"), because PMA member ocean carriers have contracted out such work to non-ILWU facilities with lower labor costs such as those operated by respondent companies.

ILWU-represented employees are employed by the PMA stevedoring employers as a group. Hence their fringe costs must be allocated among PMA companies and ocean carriers under industry-allocation formulae. A high proportion of the industry's fringe benefit costs—i.e., for pension and welfare benefits—are fixed costs. Drastically shrinking man-hours in the industry due to containeriza-

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[2]See, e.g., *National Labor Relations Board v. International Longshoremen's Association*, 447 U.S. 490 (1980).

The Court of Appeals noted in the instant case: "While cargo tonnage shipped in containers during the last 25 years has increased 800 percent, ILWU hours worked dropped 50 percent" 721 F.2d at 1201, Appendix A, p. A 3.

[3]As early as 1969 ILWU had sought to resolve the problem of longshore job loss by compelling PMA to enter into an agreement that all stuffing and unstuffing of containers would be done by the ILWU work force. The NLRB held this contract violated the NLRA. The Court of Appeals for the District of Columbia Circuit has remanded that case to the NLRB for reconsideration in the light of *NLRB v. ILA*, supra. The Fourth Circuit has just held that the I.L.A.'s rules dealing with container work do not violate the NLRA either on their face or as applied. It has rejected any role for the FMC in these matters. *American Trucking Associations v. NLRB*, ... F.2d ..., ... DLR ... (4th Cir. May 9, 1984; No. 83-1185 et al).

In 1978 ILWU compelled PMA to agree that the "status quo" would be maintained as to CFS work then being performed by ILWU-represented employees. However, since that agreement did not bind new services or carriers and because it was difficult to police, ILWU-represented employees continued to lose CFS work. It was against this background that the 1981 agreement involved in this case was negotiated.

tion make such costs per man hour very high. For highly mechanized operations such as loading and unloading of cargo on and off ships, high man-hour costs are bearable, but for the remaining labor-intensive sectors of the industry, such as CFS facilities, such costs are burdensome.

Before 1981 the industry had allocated about 80% of its fringe benefit costs on a man-hour basis and only about 20% on the basis of tonnage loaded to or discharged from vessels. ILWU believed that this allocation of fringe costs, by assigning higher costs to the very facilities which were facing the severest job losses, was encouraging CFS work to move away from the docks. For this reason ILWU insisted in the 1981 negotiations that PMA reallocate all fringe benefit cost to a tonnage basis. While PMA did not agree to change its allocation formula *in toto* as ILWU demanded, the parties, in collective bargaining, did reach a compromise agreement under which about 90% of the man-hour based fringe costs borne by ILWU CFS facilities were shifted to tonnage assessments, which do not fall upon CFS facilities.

The agreement provided that the employers would accomplish this cost shift by raising a fund through an assessment upon each ton of containerized cargo loaded to or discharged from vessels in California, Oregon and Washington ports by or for PMA members. The fund would be used to reimburse PMA member-employers operating container facilities under the ILWU-PMA contracts for certain of the payments those employers had made to the ILWU-PMA Benefit Plans. The ILWU agreed in return to increase productivity and to eliminate wasteful work practices. This CFS Program Fund and its Implementation Procedures ("the Agreement") are printed in Appendix E.

The Agreement was filed with the Federal Maritime Commission ("FMC") and thereupon was approved by operation of law pursuant to Section 4 of the MLAA.

B. The Maritime Labor Agreements Act of 1980

For half a century subsequent to the passage of the Shipping Act of 1916 (46 U.S.C. 801 et seq.), FMC never considered "labor-related agreements" to be subject to its jurisdiction. S. Rep No. 854, 96th Cong., 2d Sess. 7(1980) ("S.REP."). In 1968, however, this Court held that an assessment agreement among PMA members implementing funding obligations imposed on employers by the ILWU-PMA contract was subject to FMC jurisdiction *(Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 216 [1968]). In 1978 this Court held that FMC had jurisdiction over a portion of the ILWU-PMA contract which had been held to affect the terms and conditions upon which non-members companies could have access to the ILWU work force (*Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40 [1978]).

Congress reacted to those two decisions by enacting MLAA. It had heard testimony from representatives of management and labor and of the FMC itself to the effect that those decisions

> have undermined the national labor policy of encouraging the peaceful resolution of labor disputes through collective bargaining by transforming such bargaining into a process of adjudicatory confrontation before the Federal Maritime Commission. They maintain that it is impossible for any multi-employer bargaining association in the maritime industry to be sure that its collective bargaining agreements are final and not subject to lengthy hearings before the Commission followed by protracted litigation in the courts. The resulting delay and uncertainty is particularly detrimental to the collective bargaining process because the viability of that process depends upon expedition and the ability of each side at the bargaining table to deliver its parts of the bargain, often at the eleventh hour or while in the throes of a crippling strike. (S. REP. 9).

Congress agreed and passed the MLAA to preclude the FMC, with two exceptions,[4] from regulating labor agreements or their implementation.[5] The House version had precluded any FMC jurisdiction over labor agreements. (See H.R. Rep. No. 876, 96th Cong., 2d Sess. 10-12 [1960]).[6] The FMC participated actively in the legislative process. Before the Senate Committee, the FMC switched its position from support of the House version to support of a proposal retaining limited jurisdiction over "assessment agreements", as requested by West Coast forestry product shippers and carriers who were then engaged in litigation over their fringe cost shares.[7] The FMC and these forestry

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[4]The first exception—specialized regulation of fringe assessments—is involved here. The second exception—prices and rules concerning their application required by section 18 of the Shipping Act (46 U.S.C. 817) to be set forth in FMC tariffs—is contained in section 5 of the MLAA (46 U.S.C. 841c) and is not an issue in this case.

[5]Subsequent to *Volkswagen* and prior to the MLAA, the FMC had erratically applied an ad hoc "labor exemption" from the Shipping Act, based on the labor exemption from the antitrust laws. (See S. REP. 7-8). Where FMC jurisdiction was found, approval of a labor agreement under 46 U.S.C. § 814 exempted the agreement and its implementation from the antitrust laws. (See *FMC v. Pacific Maritime Ass'n*, 435 U.S. 40, 53 (1978).

[6]The House Committee found that the FMC was the only regulatory agency involved in regulating the collective bargaining of the industry subject to its jurisdiction. (H.R. Rep. No. 876, *supra* at 6). The Senate Committee found that this intrusion into collective bargaining defeated the "express national labor policy of free and unfettered bargaining without governmental intervention..." (S. Rep. No. 854 at 10; see H.R. Rep. No. 876, *supra*, at 5).

[7]See *Amend the Shipping Act, 1916: Hearing Before the Sub-Comm. on Merchant Marine and Tourism of the Comm. on Commerce, Science and Transportation on H.R. 6613*, 96th Cong., 2d Sess., pp. 10-19, 45-56 (1980) (testimony of FMC, Weyerhaeuser Co. and Crown Zellerbach Co.). These companies were then litigating against PMA over their fringe cost shares. See *Approval of Settlement Agreement, Standard Fruit & S.S. Co. et al v. PMA*, 20 S.R.R. 909, 911 (1981).

interests entered into a compromise which consisted of a narrow exception to section 4 of the MLAA whereby jurisdiction over fringe costs assessments was retained by the FMC. (S. REP. 13).

This compromise eliminated the FMC's standing as a representative of the public interest to review assessment matters on its own motion or on protest as it does with other types of agreements. 46 C.F.R. § 502.61 (1981). FMC's role was limited to hearing complaints brought by an "aggrieved" or "affected" party having a "financial stake" in assuring that "their share of fringe" costs was equitable. (S. REP. 13-14). "The primary reason for subjecting these agreements to FMC scrutiny upon complaint is to insure that all affected parties *pay only their fair share of fringe benefit obligations*" (Id. at 14; emphasis supplied). In addition, "separate treatment" was provided for an assessment agreement and "the charge or assessment pursuant thereto". Congress provided "particular . . . procedural mechanisms" for handling assessment disputes, a special statute of limitations and a special provision for complaints. It limited the available remedies only to persons who paid fringe assessments. (S. REP. 14; see also S. Rep. No. 414, 97th Cong. 2d Sess. 31 [1982]). The MLAA set forth the exclusive substantive standards to be applied under the Act to fringe assessments and assessment agreements. (See H.R. Rep. No. 611, 97th Cong., 2d Sess. 36 [1982]). Its final sentence provided that its terms "shall control" in the event of conflict with any other sections of the Act. To assure that antitrust factors are not to be considered in evaluating the legality of assessment agreements, Congress deleted the "public interest" test which had theretofore been held to require such consideration. (*FMC v. Svenska Amerika Linien*, 390 U.S. 238 [1968]).

> Antitrust considerations are not a factor to be weighed by the Commission in evaluating these agreements. S. REP. 14.

C. Respondent Companies Complain to the Federal Maritime Commission About Petitioners' Collective Bargaining Contract

Respondent companies operate off-dock container freight stations where they stuff and unstuff marine cargo containers under sub-contracts with PMA and non-PMA ocean carriers. Their labor costs per cargo unit were, on average, approximately one-third the labor costs of employers of ILWU labor.[8] By 1981 they and similar non-ILWU employers had captured 75% of the market for CFS work.[9]

Respondent companies, seeking to compel a continuation of their three to one labor cost advantage over ILWU facilities, invoked the jurisdiction of the FMC pursuant to Sections 15 and 22 of the Shipping Act, 1916, 46 U.S.C. §§ 814 and 821, as amended. They filed complaints with the FMC alleging that the Agreement was not an assessment agreement as defined in the MLAA, and that therefore the FMC had no jurisdiction over it, or, if it did, the Agreement violated the Shipping Act. The effect of the relief sought (setting aside the 1981 CFS Program provisions of the collective bargaining agreement) would be to restore the pre-existing high fringe costs allocated to CFS facilities by PMA's predominately man-hour assessment system.

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[8]Even after the reduction of CFS fringe costs obtained by ILWU in 1981, labor costs per cargo unit at ILWU facilities in early 1982 were, on average, more than twice as high as at respondent companies.

[9]Had this lost work been performed by ILWU labor, more than 2,450,000 ILWU man-hours of employment would have resulted in 1981 alone.

D. The Commission Decides Respondent Companies Have No Standing to Complain About Petitioners' Collective Bargaining Agreement

After extensive hearings and briefs, the FMC concluded that it did have jurisdiction over the Agreement but that respondent companies did not have standing to attack it because they were not required to pay assessments and because they were not "carriers, shippers or ports"—the only entities identified in MLAA as the protected class.

The FMC noted that the MLAA contemplated a complaint procedure for assessment agreements separate and distinct from that provided for in the case of all other agreements and that the MLAA expressly identified the class "intended to receive the protection of the statute . . . to wit: 'carriers, shippers or ports' ".

> It would therefore appear to be inconsistent with the scheme of the MLAA to find that "any person", regardless of how remotely associated with a given assessment agreement may utilize the carefully circumscribed complaint procedures of the MLAA. 21 SRR at 1539; Appendix C, p. A 31.

Since the "overall purpose of the MLAA complaint procedure was to afford a forum to those who directly or indirectly pay assessments to challenge their fairness", the statute "clearly does not contemplate an inquiry into the impact of an assessment agreement on the competitive positions of third parties". 21 SRR at 1539; Appendix C, p. A 32.

> [Respondent companies] alleged injury is not caused by an assessment obligation directly or indirectly placed upon them by the challenged Agreement. Rather, and at best, it is an economic effect of the assessment on their competitive standing vis-à-vis

> those who *are* subject to assessment obligations, *i.e.*, PMA members. Congress did not intend such a remote consequence to form the basis of a complaint seeking disapproval of a collectively bargained assessment on their competitive standing vis-à-vis PMA members. Congress did not intend such a remote consequence to form the basis of a complaint seeking disapproval of a collectively bargained assessment agreements under the MLAA. Parties so removed from the operative effects of an assessment agreement are outside the classes of interests protected by the statute, and, as such, not intended to be beneficiaries of its remedies. 21 SRR at 1539-1540; Appendix C, p. A 33. (Emphasis in original; footnotes omitted).

In its decision the FMC recognized that Congress had directed it not to inquire into the "impact of an assessment agreement on the competitive positions of other third parties" and concluded that "antitrust considerations [had been] intentionally not made applicable . . . ." (21 SRR at 1539; Appendix C, p. A 32).

E. The Court of Appeals Reverses the Commission

Respondent companies appealed to the Ninth Circuit, invoking its jurisdiction pursuant to 28 U.S.C. § 2342(3) and 46 U.S.C. § 830.

The Court of Appeals reversed the Commission. It acknowledged that since respondent companies were neither carriers, shippers nor ports, they had no standing to contest the ILWU-PMA agreement as discriminatory. However, the court held that because they were engaged in interstate commerce and had alleged that reductions in their competitors' fringe costs had an adverse economic impact on them, respondent companies had standing, as competitors of PMA members doing CFS work, to attack the collective bargaining agreement as "detrimental to commerce".

REASONS FOR GRANTING THE WRIT

The writ should be granted in this case because:

(a) The Court of Appeals decided an important question of federal law which has not been, but should be, decided by this Court. It has interpreted the MLAA in a manner which conflicts with the Congressional purpose to remove collective bargaining agreements from FMC jurisdiction and which conflicts with national antitrust policy by permitting competing employers to seek to impose conditions on employers in other bargaining units.

(b) In so doing, the Court of Appeals decided federal questions in a way which conflict with the applicable decisions of this Court and decided, contrary to this Court's decisions, that competitors who do not have an interest protected by the statute have standing to sue under it.

(c) The Court of Appeals rendered a decision in conflict with decisions of other Courts of Appeals by granting standing to competitors who were not the intended beneficiaries of the statute and whose competitive interests were not intended to be protected by the statute. In so doing, it utilized a "standing" analysis in conflict with that applied by other Courts of Appeals.

A. This Is the First Case to Reach This Court Involving the Application and Interpretation of the Maritime Labor Agreements Act of 1980. That Act, Amending the Shipping Act of 1916 in Significant Respects Insofar as Concerns Collective Bargaining Agreements in the Maritime Industry, Was Misinterpreted by the Court of Appeals

It is beyond question that the purpose of MLAA was to get FMC out of the labor relations business and to keep it from supervising collective bargaining agreements.

The decision below, permitting entities outside the bargaining unit to attack a collective bargaining contract as "detrimental to commerce", puts FMC squarely back into

the collective bargaining arena, as this case clearly demonstrates.[10] If respondent companies have standing to attack the legality of the underlying collective bargaining agreement as "detrimental to commerce", the FMC will become involved in balancing basic labor matters, such as the union work preservation objectives, against respondent companies' claims as competitors. *Cf. Council of North Atlantic Shipping Association v. F.M.C.*, 672 F.2d 171 (D.C. Cir. 1982) *cert. denied* ..... U.S. ....., 74 L.Ed 2d 69. This is precisely what Congress intended that the Commission should not do.

It is an important question of federal law which this Court should settle whether the MLAA is to be interpreted in a manner which results in putting the FMC back into the business of supervising collective bargaining contracts to determine whether or not they are "detrimental to commerce". Especial importance attaches where such an interpretation is sought by persons for whose benefit the statute was not enacted.[11]

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[10]Since the parties had no way of knowing in advance how the FMC would rule on either the jurisdictional or the standing issue, they of necessity developed a full record "on the merits". That record is replete with evidence concerning labor relations matters, such as the history of ILWU's negotiations with PMA over the last twenty years on the impact of containerization on waterfront jobs, jurisdictional disputes between ILWU and other unions concerning the stripping and stuffing of containers and their movement on or about the docks, arbitration proceedings relating to these matters and similar matters. The first witnesses respondent companies called were the president and other officers of the ILWU. Days were spent probing into labor relations matters and there were placed in evidence thousands of pages of ILWU caucus minutes as well as hundreds of pages of ILWU-PMA negotiating minutes.

[11]An assessment agreement which is alleged to be "detrimental to commerce" *is* subject to review by the FMC upon complaint filed by a carrier, shipper or port. The Port Authority of New York and New Jersey has filed complaints against an assessment agreement recently negotiated by the International Longshoremen's Asso-

Many statutes providing for private remedies either are ambiguous as to who may sue to enforce them or utilize broad "any person" language in referring to private causes of action. If businessmen may use such statutes to regulate their competitors' business where the statues are intended to protect interests other than competition, a broad "hunting license" is conferred under which litigation may be used to cause competitive harm—here by seeking to compel competitors to bear continuing high fringe costs in contravention of the labor contract. The Court of Appeals here, alone among the Circuits, decided this important question erroneously by permitting competitive interests not protected by the statute to confer standing to sue.

It is also an important question of federal law which this Court should settle whether, in the light of national labor policy, the MLAA should be interpreted to permit competitors to initiate a proceeding which could result in governmental cancellation, disapproval or modification of collectively-bargained assessment agreements. *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99, 108 (1970) made it clear that the "fundamental premise" of the National Labor Relations Act, 29 U.S.C. 151 et seq. prohibited "official compulsion over the actual terms of the contract". This national labor policy will be severely undermined if parties not in the bargaining unit are given standing to maintain

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ciation. (*Port Authority v. New York Shipping Association, et al.*, FMC Dockets 84-6 and 84-8). This should dispose of the concern expressed by the Court of Appeals that "denial of standing to petitioners might well have the effect of conferring antitrust immunity on an agreement that violates the Shipping Act" 721 F.2d at 1204, n.7; Appendix A, p. A 11, n.7. Compare *Water Transport Association v. I.C.C.*, 722 F.2d 1025, 1030 (2d Cir. 1983) ("... we lack authority to subject that railroad to this I.C.C. complaint proceeding simply because Congress has left its antitrust immunity intact.")

It should also be noted that in *Volkswagen*, the complaint was brought by a *shipper* and in *PMA*, the complaint was brought by *port authorities*.

a proceeding which may have such a result. To that extent the decision impinges on the NLRB's primary jurisdiction over collective bargaining. While "any person" may initiate a charge before the NLRB (*NLRB v. Local No. 42, et al.*, 469 F.2d 163 [3d. Cir. 1972] *cert. den.* 412 U.S. 940 [1973]), Congress made clear that only carriers, shippers or ports may do so under MLAA.

In addition, the Court of Appeals' expansion of the MLAA's protected class to include competing employers who seek to use the FMC to impose higher labor costs in petitioners' bargaining unit is contrary to the labor and antitrust policies articulated in *United Mine Workers v. Pennington,* 381 U.S. 657 (1965). *Pennington* held that national labor and antitrust policies would not permit one set of employers to impose high labor costs on competing employers in another bargaining unit. By granting standing to respondent companies the Court of Appeals has permitted an action to go forward which seeks to impose the result proscribed by *Pennington.* That the result may be obtained via an administrative ruling rather than, as in *Pennington,* via a collective bargaining agreement is immaterial. The *Pennington* rule is one of substance. It is not to be breached, irrespective of the form of the breach. *Cf. California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972). Nothing on the face of the statute or in its legislative history justifies the assumption that Congress intended to overrule *Pennington* by permitting competitors to use the MLAA to upset labor bargains and increase labor costs in other bargaining units.

In holding that respondent companies had standing to attack their competitors' collective bargaining agreement, the Court of Appeals misinterpreted the relevant provisions of the MLAA. It is true that Section 4 of the MLAA creates an exception to its withdrawal of FMC jurisdiction over maritime labor agreements. FMC may "disapprove, cancel, or modify" an assessment agreement found to be

"unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States". Appendix D, pp. A 39-40. While the MLAA does not explicitly state that only carriers, shippers or ports may invoke this limited FMC jurisdiction, it certainly does not state that persons outside the bargaining unit who pay none of the fringe costs may utilize these provisions to upset their competitors' labor bargains and to raise their competitors' labor costs.

In *Texas & Pacific Railway Co. v. United States*, 289 U.S. 627, 638 (1933) this Court held that Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3, as it read in 1933, prohibiting discrimination between "any particular person, corporation, or locality, or any particular description of traffic" deprived a port of standing to complain

> The Act was passed for the protection of those who pay or bear the rates.

While the Court of Appeals noted that the statute provides that an assessment agreement may be disapproved "upon complaint filed", it neglected to point out that the legislative history makes clear that such a complaint may be filed only by "an aggrieved party" (S. REP. at 13), described as a party who has "a financial stake in assuring that assessment charges are equitable." (S. REP. at 14). The Court of Appeals acknowledged that the legislative history (S. REP. 14) established

> [T]he primary reason for subjecting these agreements to FMC scrutiny upon complaint is to insure that all affected parties pay only their fair share of fringe benefit obligations.
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> 721 F. 2d at 1206; Appendix A, pp. A 14-15.

Seizing upon the word "primary" the Court of Appeals stated that it did not follow that this was the "only" consideration. Recognizing, as it had to from the legislative history, that Congress did in fact intend to eliminate anti-

trust factors, the Court of Appeals nonetheless said that it "does not necessarily follow that Congress wanted to eliminate consideration of all impacts an assessment agreement might have on competition." Without any support in the legislative history, it opined that Congress might have intended to retain FMC jurisdiction when an assessment agreement had "anti-competitive effects". 721 F.2d at 1206, Appendix A, pp. A 15-16.

The legislation clearly contradicts this interpretation. It specifically eliminates "public interest" as a factor to be considered by the FMC and, as the legislative reports show, provides that "antitrust considerations are not a factor to be weighed . . ." S.REP. 14. Furthermore, the only remedy which the FMC can grant in the case of assessment agreements is "by means of assessment adjustments" which are to be implemented only "by prospective credits or debits to future assessments or charges. . . ." Appendix D, p. A 40. Finally, Congress made it clear that these amendments were "to control" in the event of any conflict with any other section of the Shipping Act.

The Court of Appeals held (721 F.2d at 1204; Appendix A, p. A 12) that section 4 of the MLAA could not be treated as a "repeal by implication" of section 821 of the Shipping Act which, with respect to non-labor agreements, permits "any person" to proceed with a complaint before the Commission and to obtain a great variety of relief. It is hard to imagine a more direct and unequivocal repeal. Section 821 deals with all sorts of maritime contracts and provides a vast panoply of remedies. Section 4 of the MLAA deals only with collectively-bargained assessment agreements, provides very specific procedures and limited remedies and states on its face that in the event of conflict with 821, section 4 "shall control."

The Court of Appeals ignored the fact that, in the very next session of Congress, it was specifically stated that "[t]he remedies and regulatory standards applicable assessment agreements are, as *they were under section 15*

of the Shipping Act, 1916[12] limited to those set forth in section 4(f)(1) of this bill."[13] H.R. Rep. No. 611, 97th Cong., 2d Sess. 36 (1982) (emphasis supplied). This virtually contemporaneous expression by Congress that the remedies available and regulatory standards applicable to those claiming that assessment agreements violate the MLAA were limited to those specifically set forth in the MLAA is powerful evidence that Congress did not intend anyone to have standing to attack an assessment agreement just because he was a competitor "engaged in commerce".

The FMC was faithful to the legislative history of the MLAA and, as a participant in the legislative process, was in a unique position to understand and articulate Congressional intent. It is a "venerable principle that the construction of a statute by those charged with its execution should be followed . . ." *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969). Substantial deference and great weight is to be accorded to an agency's interpretation of a statute when the agency participated, as the FMC did here, in drafting the statute. *Zuber v. Allen,* 396 U.S. 168 (1969).

The Court of Appeals' failure to follow these precepts led it into an interpretation of the MLAA which cannot be squared with the legislative intent to keep the FMC out of collective bargaining or with national labor and antitrust policy. Before such a reading of the statute is permitted to stand, it should be reviewed by this Court.

B. The Decision of the Court of Appeals Misread and Misapplied the Controlling Decisions of This Court

In *Cort v. Ash,* 422 U.S. 66 (1975) this Court held that a private remedy is not to be implied in a statute not ex-

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[12]Section 15 of the Shipping Act is 46 U.S.C. 814, as amended by the MLAA, provides only the limited remedies and regulatory standards referred to in the text hereof. (our footnote)

[13]Section 4(f)(1) of the bill under consideration in 1982 provided for the identical limited remedies and standards. H.R. Rep. No. 97-611, part 1, *supra,* p. 4 *id.,* part 2, page 4. (our footnote)

pressly providing for one unless (1) "the plaintiff [is] 'one of the class for whose *especial* benefit the statute was enacted', *Texas & Pacific R. Co. v. Rigsby,* 24 U.S. 33, 39 (1916) (emphasis in original)", (2) there is an "indication of legislative intent . . . to create such a remedy . . ." and (3) "it [is] consistent with the underlying purposes of the legislative scheme to imply such a remedy *for the plaintiff* . . ." 422 U.S. at 78 (emphasis supplied). Referring to the *Cort* tests, this Court later observed that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in *that person*". *Cannon v. University of Chicago,* 441 U.S. 677, 688 (1979) (emphasis supplied).

The Court of Appeals disposed of *Cort* "and progeny" by reading those cases as holding merely that they "create a test for determining whether any, rather than which, private party has a cause of action under the substantive statute". (721 F.2d at 1202-1203; Appendix A, p. A 7).

This is a misreading of *Cort* and its progeny. In *Cort,* this Court specifically held that "the intent to protect *corporate shareholders* particularly was at best a subsidiary purpose of § 610 . . ." 422 U.S. at 80 and was "at best a matter of secondary concern" (*id.* at 81). Since "the primary purpose" (*id.*)[14] of the statute was to assure the fairness of federal elections, there was no "clearly articulated federal right *in the plaintiff*" nor was there "a pervasive legislative scheme governing the relationship between *the plaintiff class and the defendant class* in a particular regard . . ." (*id.* at 82). This Court was also impressed with the fact that there was no indication in the legislative history which suggested a congressional intent "to vest in *corporate shareholders* a federal right to damages." (*id.* at 83) (all emphases supplied).

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[14]This Court did not, as the Court of Appeals did, look behind the primary purpose of the statute to infer or imply some other purpose which might be lurking in the statute.

The Court of Appeals failed to appreciate that merely because the MLAA created a limited cause of action in some persons—carriers, shippers or ports—to obtain limited relief in the case of assessment agreements which are detrimental to commerce, it did not thereby create a cause of action for anyone and everyone engaged in commerce to attack such agreements. The Court of Appeals read *Cort* and its progeny much too narrowly. It did not consider that the MLAA did not create a cause of action for the "especial benefit" of these particular respondent companies.

In *Middlesex City Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), this Court emphasized that in determining whether Congress intended to create a private cause of action under a statute without saying so explicitly, "[w]e look first, of course, to the statutory language, *particularly to the provisions made therein for enforcement and relief*" 454 U.S. at 13 and reaffirmed its statement in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 at 19 (1979) that "it is an elementary canon of statutory construction that where a statute expressly provides *a particular remedy or remedies*, a court must be chary of reading others into it." 453 U.S. at 14-15. This Court made it clear in *Middlesex* that "In the absence of strong indicia of a contrary Congressional intent, we are *compelled* to conclude that Congress provided precisely the remedies it deemed appropriate." 454 U.S. at 15. (all emphases supplied).[15]

The Ninth Circuit ignored the fact that the MLAA provided precise, particular and specific remedies in cases of

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[15]Even before *Cort*, this Court had made it clear that where "legislation expressly provides a particular remedy or remedies, courts should not extend the coverage of the statute to subsume other remedies." *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

assessment agreements detrimental to commerce.[16] By granting standing to respondent companies who are not entitled to the only enforcement and relief provided for in the statute, the Court of Appeals ignored the teachings of this Court in *Middlesex*.

The Court of Appeals, by granting standing to competitors whose interests were not especially intended to be protected by MLAA, misread this Court's decisions. It ignored that the statute protected only a limited class and provided only particular remedies which are not available to respondent companies. To review this departure from this Court's holdings the writ should be granted.

C. The Decision Below Conflicts With the Decisions of Other Courts of Appeals in Two Important Respects

1. It Grants Standing to Sue for Alleged Competitive Injury Contrary to Decisions in Other Circuits

The Ninth Circuit has granted respondent companies standing to advance their competitive interests under a statute which was not enacted to protect those interests. Other Courts of Appeals have faced comparable questions and have, consistently with this Court's teachings,[17] decided otherwise.

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[16]The Ninth Circuit itself has not been consistent in this regard. In *National Association of Recycling Industries v. American Mail Line Ltd.*, 720 F.2d 618 (9th Cir. 1983), *cert. den.* . . . U.S. . . . 52 U.S. Law Week 3688 (1984), it rejected an argument that the absence of an antitrust remedy required it to grant plaintiff a Shipping Act remedy.

> The path to more effective remedies begins in Congress, not the courts.
> 720 F.2d at 621

[17]*Singer v. Union Pacific R. Co.*, 311 U.S. 295, 300 (1940); *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478 (1938).

The Ninth Circuit itself has denied standing to a competitor seeking to assert a claim under the *National Health Planning & Resources Development Act of 1974*, 42 U.S.C. § 300 k et seq. because "Congress . . . did not intend to create a private right of action in favor of competing providers . . . Congress was not concerned with the harm that a competitor might suffer . . ." *Community Psychiatric Centers v. Grant*, 665 F.2d 1148, 1151 (9th Cir. 1981).

Davis Forestry Corp. v. Smith, 707 F.2d 1325 (11th Cir. 1983) *rhg. denied* 714 F.2d 159, involved the Farm Labor Contractors Registration Act, 7 U.S.C. § 2041 et seq. (FLCRA)[18] which provided that "[*a*]*ny person* claiming to be aggrieved by a violation of *any* provision of this Act . . . may file suit in any district court . . ." (emphasis supplied). Despite the breadth of this statutory language, the Court of Appeals for the Eleventh Circuit denied standing to competitors.

> Our inquiry is whether farm labor contractors or competitors of such are within the zone of interests sought to be protected by FLRCA, specifically 7 U.S.C. 2050(a) . . . Davis Forestry is attempting to utilize the private cause of action provision of FLRCA to remedy what it perceives as unfair competition. 707 F.2d at 1328.

The court reviewed the cases relied upon by plaintiff and noted

> . . . Davis Forestry, however, does not direct us to *any* case where *any* court has granted standing to a competitor of the alleged infringer under a statute's private cause of action provision. We doubt that the *Trafficante* court would grant standing to a housing project in the same neighborhood based on a claim that it was taking away some of its customers because of a policy of racial discrimination (*Id;* emphasis in original.)[19]

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[18]Now, the Migrant and Season Agricultural Worker Protection Act, 29 U.S.C. 1801 et seq.

[19]*Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) allowed standing to white tenants of a housing project to sue for deprivation of benefits to be gained by living in an inter-racial community caused by the landlord's discriminatory action against non-whites. The court also did not believe that *EEOC v. Bailey Co.*, 563 F.2d 439 (6th Cir. 1977), which had held that a white person claiming a loss of benefits from lack of work association with racial minorities was "aggrieved" for Title VII (42 U.S.C. 2000e) purposes,

The Court concluded

> Business competitors may have a variety of claims against one another but we find no suggestions that Congress intended to include such between farm labor contractors when it enacted 7 U.S.C. 2050(a). *Id.* at 1329.

There is no suggestion in the legislative history of MLAA that Congress intended to include claims of competitors in the limited cause of action it created in that statute for shippers, carriers or ports.

Another Eleventh Circuit case presenting the question of whether a claimed economic or competitive loss will confer standing is *Bank Stationers Association v. Board of Governors, Federal Reserve System*, 704 F.2d 1223 (11th Cir. 1983). There standing was denied to an association of check printers claiming that the Board's action in charging fees insufficient to cover the costs of providing clearing house services violated § 107 of the Monetary Control Act of 1980, 12 U.S.C. § 248a (Supp. IV, 1980) (MCA) and "injure[d] their economic interests." 704 F.2d at 1234. Although the plaintiffs alleged a cognizable injury in fact,[20] the court held that they had no standing.

> An examination of § 107 and its legislative history reveals no indication that Congress intended to protect printers of checks . . . Bank Stationers . . . are . . . removed from the core concern of the statute . . . Section 707 is intended to encourage competition between the Board and clearing house operators. . . . Bank Stationers are . . . *tangential to the competitive*

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would support the "grant of standing *to a competing employer* based upon allegations suggesting a policy of discrimination *had resulted in unfair lower prices.*" 707 F.2d at 1328 (emphasis supplied).

[20] "The injury alleged by Bank Stationers is a reduction in demand for their product . . . caused by the Board's below cost fees for ACH services. . . . These allegations sufficiently describe the specific injury to Bank Stationers. . . .". 704 F.2d at 1235.

concern of the statute. 704 F.2d at 1236-1237 (emphasis supplied).

Citing *Bank Stationers*, the Court of Appeals for the Sixth Circuit held that private air couriers have no standing to enjoin the Federal Reserve Board from implementing an order modifying fee schedules for check collecting services. *Jet Courier Services v. Federal Reserve Bank of Atlanta*, 713 F.2d 1221 (1983). Plaintiffs alleged that the new fees violated § 107 of the MCA because they tended to create a "monopoly or near monopoly for Federal Reserve Banks in the market for check collecting and transportation services in violation of a Congressional mandate that Reserve Banks compete on a fair and equal basis with their commercial clearing bank counterparts".[21] According to plaintiffs the unfair competition was achieved "by establishing fee schedules which failed to cover the full costs of the services offered by the Federal Reserve Bank". Plaintiffs also alleged that the fee schedules "had no relation to the cost of the services actually offered and reflected 'a deliberate pattern of predatory pricing.' " 713 F.2d at 1224.

The court had no difficulty finding that plaintiffs' allegations established that they would suffer injury in fact since they "will lose business because their bank customers which provide check collection services will be unable to compete with the Federal Reserve Banks because of their below-cost pricing . . ." *id.* at 1225. Nonetheless, because there was found nothing in the text of the MCA to indicate that Congress "sought to protect the competitive position of private air couriers" and, because the legislative history of the MCA was "devoid of any indication that Congress intended to protect the competitive position of the plain-

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[21]There is no mandate in the MLAA that on-dock CFS operators compete "on a fair and equal", or any other, basis with off-dock CFS operators. Antitrust considerations were expressly excluded from FMC consideration of assessment agreements.

tiffs" (*id.* at 1227), it held that they had no standing to maintain the action. The court noted that the legislation concerned only the interests of service providers, depository institutions and private consumers and that air couriers were not in this protected class (*id.*). So here, the MLAA is concerned only with the interests of shippers, carriers or ports, not with the competitive interests of off-dock CFS operators.

In *Water Transport Association v. I.C.C.*, 722 F.2d 1025 (2d Cir. 1983) the Court of Appeals for the Second Circuit addressed the contention that an ICC rule[22] denying standing to water carriers to challenge rail transportation contracts violated the Staggers Act, 49 U.S.C. 10713. Plaintiffs alleged that § 707 of the Act gave them standing to challenge such contracts "on the grounds that they undermine rail-water competition". 722 F.2d at 1028.

Without questioning plaintiffs' claim of competitive injury, the court upheld the ICC rule. It pointed out that "[s]ection 10713(d)'s express language, however, contemplates challenges only by shippers and ports, not water carriers, and such challenges are limited to narrowly defined claims.[23] An expansion of standing to additional parties where the express language of the Act confers standing only upon a limited class seems unwarranted in the light of the 'principle of statutory construction reflect[ed in the] ancient maxim—*expressio unis est exclusio alterius'. National Railway Passenger Corp. v. National*

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[22]The fact that the FMC denied respondent companies standing by an adjudicative decision rather than by a rule should make no difference in the outcome of the case.

[23]Section 10713(d) provides that a complaint may be filed only, (2)(A)(i), "by a shipper" or, (2)(A)(ii), "by a port". This is analogous to MLAA's limitation on the filing of complaints before the FMC to shippers, carriers and ports. (Our footnote).

Association of Railroad Passengers, 414 U.S. 453, 458 . . . (1974). Moreover, even if Sections 707 and 10713(d) are thought to be in conflict, the detailed provisions of the latter must be construed to supersede the more general provisions of the former." 722 F.2d at 1028, 1029.[24]

The legislative history of the Staggers Act showed that "Congress intended to allow only limited challenges to railroad contracts before the ICC and that wholesale challenges were viewed as inconsistent with Congress' belief that 'greater reliance on the market place . . . is essential to achieve maximum utilization of railroads' . . ." 722 F.2d at 1029. Here, the legislative history of the MLAA is clear that Congress intended to allow only limited challenges to assessment agreements before the FMC and that wholesale challenges are inconsistent with Congress' belief that collective bargaining agreements should be removed from FMC jurisdiction.

In *Fire Equipment Manufacturers Association v. Marshall,* 679 F.2d 679 (7th Cir. 1982 *cert. denied* ..... U.S. ....., 74 L.Ed2d 953 (1983), manufacturers of fire extinguishers, challenged an OSHA regulation which permitted the use of fire hoses in the work place. They contended that they would "suffer a competitive disadvantage" because employers would use the less expensive hoses. The Court of Appeals for the Seventh Circuit denied standing.

> Congress did not intend to protect employers from competitive disadvantage and any benefit employers receive in the way of relief from competition is "wholly incidental to the purpose and design of the program. . . . If [petitioners] claim their injury is competitive

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[24]This, even without the specific provision in the MLAA that it "shall control" in the event of conflict with other provisions of the Shipping Act.

> disadvantage, they have not satisfied the zone of interest test." 679 F.2d at 683.[25]

In *Control Data Corp. v. Baldridge*, 655 F.2d 283 (D.C. Cir. 1981) *cert. denied* 454 U.S. 881, the Court of Appeals for the District of Columbia Circuit denied standing to suppliers of computer systems to the government seeking to challenge rules promulgated by the Secretary of Commerce establishing "mandatory specifications governing virtually all procurements of computer equipment by the federal government". 655 F.2d at 284. The claim was that the rules violated the Brooks Act, 40 U.S.C. 759(f) and adversely affected appellants' interest "in continuing to compete for federal . . . contracts". It was also asserted that "competition has been recognized as an effective avenue to the accomplishment of the professed goal of these statutes, and that by challenging standards which allegedly inhibit competition appellants promote the Congressional interest in free and open competition." *Id.* at 289.

The Court acknowledged that these allegations satisfied the "injury in fact" element of the standing inquiry, but concluded that appellants' competitive interests were not those sought to be protected by the legislation. Rather,

> The Congressional interest in competition, when viewed in its proper context, is grounded in a quite different premise. . . . Competition was not, therefore, valued for itself, but for the benefits it could bring the government. *Id.* at 295.[26]

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[25]Accord: *R. T. Vanderbilt & Co. v. OSHA Review Commission*, 728 F.2d 815 (6th Cir. 1984) ("Because third-party manufacturers are neither benefitted nor regulated, they are without judicial recourse.") 728 F.2d at 818. See also *Peoples Gas, Light & Coke v. U.S. Postal Service*, 658 F.2d 1182, 1195-1199 (7th Cir. 1981); *Marshall & Isley Corp. v. Heimann*, 652 F.2d 685, 693-694 (7th Cir. 1981), *cert. denied*, 455 U.S. 981 (1982).

[26]See also *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 134, 140-141 (D.C. Cir. 1977), *cert. denied* 434 U.S. 1086 (1978); *Texas AFL-CIO v. Kennedy*, 330 F.2d 217, 218-219 (D.C.

Because the decision below, in granting standing to respondent companies to protect their competitive position vis-à-vis petitioners, conflicts with the foregoing holdings of other circuits, the writ should be granted.

2. It Allows Standing to Sue on the Basis That the Statute Does Not Preclude the Suit Rather Than Inquiring, as Other Courts of Appeals Have Done, Whether the Statute Grants Such Standing

The Court of Appeals reversed the FMC's holding that respondent companies did not have standing because "we see nothing in the statute which restricts standing to enforce the standard on which [they] rely" 721 F.2d at 1205; Appendix A p. 14. In approaching the standing issue in this fashion the Ninth Circuit relied upon its earlier holding in *Frenton Industries v. National Shopmen Pension Fund*, 674 F.2d 1300 at 1304 (9th Cir. 1982) that an employer has standing to sue under the Employment Retirement Security Act of 1974, 29 U.S.C. §§ 1001-1461 (ERISA). ("In order to have standing to sue for a violation of a federal statute, a plaintiff must . . . show that the statute itself does not preclude the suit").

However, other Courts of Appeals, following the teachings of this Court,[27] have looked to see whether the statute

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Cir.) *cert. denied* 379 U.S. 826 (1964); *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955)

[27] *Touche, Ross and Co. v. Redington*, 442 U.S. 560 at 574 (1979). ("Implying a private right of action on the basis of Congressional silence is a hazardous enterprise at best.").

Associated General Contractors v. California State Council of Carpenters, 459 U.S. 5195 (1983). ("[T]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general."). So here, there is no justification for extending to anyone engaged in commerce a cause of action which would ordinarily be pursued by carriers, shippers or ports in their own self-interest.

granted standing to those seeking to invoke its protections and remedies. Those Courts have all examined more closely than did the Ninth Circuit the relationship of the parties before them to the cause of action asserted and, when it was not clear that such parties were intended by Congress to invoke the asserted cause of action, have denied them standing.[28] When the statute expressly identified those who fall within its protection those courts have not hesitated to deny standing to others.

In *Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Company*, 700 F.2d 889 (2d Cir. 1983) *cert. den.* ..... U.S. ....., 78 L.Ed 2d 138, the Court of Appeals for the Second Circuit denied standing to a pension fund to maintain an action under ERISA in the absence of "any indication that the legislature intended to *grant* subject matter jurisdiction over suits by employers, funds, or other parties not listed . . ." 702 F.2d at 892. The Second Circuit specifically stated that *Frenton Industries* had "applied an inappropriate standard" in holding that there was " 'nothing in the legislative history to suggest . . . that the list of parties empowered to sue under this section is exclusive . . .'." The proper focus is not on whether "Congress intended to *prevent* actions", but on whether it "intended to *grant* subject matter jurisdiction . . ." 700 F.2d at 892. (all emphases in original).[29]

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[28]Again, the Ninth Circuit has not been consistent. In *Boat Owners and Tenants Association v. Port of Seattle*, 716 F.2d 669 (9th Cir. 1983) it denied standing to a plaintiff who "ha[d] not demonstrated that the statutory scheme was enacted *for its special benefit*" 716 F.2d at 673 (emphasis supplied). See also *White Mountain Apache Tribe v. Williams*, . . F.2d . ., 52 U.S. Law Week 2462, 2463 (9th Cir. 1984) (a cause of action "arise[s] only if Congress intended the statute to create rights *for the special benefit of the class to which plaintiffs* belong".) (emphasis supplied).

[29]The Second Circuit once again rejected *Frenton* and, applying its *Pressroom Unions* standing analysis, held that an employer has no standing to maintain an action under ERISA. *Tuvia Convalescent Center v. National Union*, 717 F.2d 726, 730 (2d Cir. 1983).

In *New Jersey Speech-Language-Hearing Association v. Prudential Assurance Co.*, 724 F.2d 383 (3d Cir. 1984) the Court of Appeals for the Third Circuit held that suppliers of services to Medicare recipients had no standing to challenge the amounts received as reimbursement by Medicare providers or to challenge the procedures by which those amounts were determined. Plaintiffs' contracts with the providers required them to accept the amount received by the latter as payment in full for plaintiffs' services. Noting that providers cannot afford to pay more to suppliers than they receive, that plaintiffs will suffer real injury and have a legitimate interest in receiving reasonable compensation, the Court of Appeals observed that "the standing question in this case would be a difficult one". 724 F.2d at 386. However, since the Medicare Act, 42 U.S.C. § 1395 to 1395-xx "*expressly* grants standing to parties other than suppliers of services to challenge the very type of reimbursement procedures and decisions challenged in this case" (*id.* at 386; emphasis in original), the court held that suppliers had no such standing.

> In light of this detailed legislation for provider review, we cannot believe that Congress intended to permit suppliers of services to raise the same type of claims under the Medicare Act.
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> 724 F.2d at 387.

So here, in the light of the detailed scheme in the MLAA for review of assessment agreements by carriers, shippers

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The Second Circuit recently denied standing to unsuccessful primary candidates who brought suit under 39 U.S.C. § 3626(e) (Supp. V 1981) claiming that their opponents were ineligible for the special postal bulk rate provided for in the statute. *Siebert v. Conservative Party of New York*, 724 F.2d 334 (2d Cir. 1984). The court held that since "[t]he only beneficiaries of § 3626(e) are political committees [,] . . . individual candidates [are] outside the scope of the statute." 724 F.2d at 337.

or ports, it cannot be said that Congress intended to permit competitors to attack such agreements.[30]

The Court of Appeals for the Seventh Circuit denied standing to a local neighborhood association and three of its members to challenge HUD's approval of a building project in asserted violation of a statutory prohibition (42 U.S.C. 1437d (a)) against highrise elevators.

> Where the intent of Congress to protect only very specific interests is clear, it is inappropriate to look to other statutory provisions, which may evidence different concerns, to expand the zone of interests . . . Plaintiffs have no standing to raise any complaint based on regulatory or statutory provisions designed solely for the protection of residents of the complex.

Alshuler v. Department of Housing and Urban Development, 686 F.2d 472, 480 (7th Cir. 1982).[31]

Because the decision below, in allowing standing to parties who were not granted standing by the MLAA, conflicts with the foregoing holdings of other circuits, the writ should be granted.

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[30]*Cf., Mackey v. Nationwide Insurance Companies*, 724 F.2d 419, 422 (4th Cir. 1984) denying standing to an insurance agent who claimed a loss of commissions due to his employer's discriminatory practices against blacks.

> There is no impediment to actions by those blacks who were denied property insurance because of the alleged discriminatory practice. Denying standing to Mackey does not insulate Nationwide from legal accountability . . .

[31]Accord: *Richland Park Homeowners Association, Inc. v. Pierce*, 671 F.2d 935 (5th Cir. 1982) ("... plaintiffs have no standing to raise any complaint as to noise levels within the apartment complex, because the noise level regulations are designed solely for the protection of the residents of the complex.") 671 F.2d at 944.

CONCLUSION

The decision sought to be reviewed permits commercial competitors to attempt to upset a collectively bargained labor agreement pursuant to a statute not enacted for their benefit, but for the benefit of an entirely different protected class. In reaching that result, the opinion below misinterpreted a recently enacted Congressional statute and decided important questions of federal law in a manner which conflicts with the decisions of this Court and of other Courts of Appeal. The writ of certiorari should therefore be granted.[32]

San Francisco, California
Dated: May 29, 1984

Respectfully submitted,

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Of Counsel

(Appendices Follow)

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[32]After this petition had been set up in galley, West Publishing Company reported the decision of the Court of Appeals for the District of Columbia Circuit in *Western Union Telegraph Co. v. F.C.C.*, 729 F.2d 811 (D.C. Cir. 1984) which held that a statute empowering an agency to order a pro rata distribution of *services* does not authorize it to order such distribution of *revenues*.

> . . . we are cognizant of the Commission's concern . . . However, Congress was also aware of this problem and statutorily prescribed a *specific scheme* to rectify it. (729 F.2d at 817; emphasis in original).

Appendix A

California Cartage Company, Inc.,
Containerfreight Terminals Company, and
Hawaiian Pacific Freight Forwarding,
Petitioners-Appellants,

v.

United States of America, and
Federal Maritime Commission,
Respondents-Appellees,

Pacific Maritime Association, and International Longshoremen's and Warehousemen's Union, Intervenors.

No. 83-7102.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 6, 1983.

Decided Dec. 12, 1983.

Before SKOPIL and PREGERSON, Circuit Judges, and MARQUEZ,* District Judge.

SKOPIL, Circuit Judge:

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*The Honorable Alfredo C. Marquez, United States District Judge for the District of Arizona, sitting by designation.

INTRODUCTION

Petitioners California Cartage Company ("Cal Cartage"), Containerfreight Terminals Company ("Containerfreight"), and Hawaiian Pacific Freight Forwarding ("Hawaiian Pacific") seek review of the Federal Maritime Commission's ("FMC's") order denying them standing to challenge an agreement between the Pacific Maritime Association ("PMA")[1] and the International Longshoremen's and Warehousemen's Union ("ILWU"). The FMC held that petitioners were not within the zone of interests protected by section 814 of the Shipping Act, 46 U.S.C. § 801 *et seq. as amended by* the Maritime Labor Agreements Act of 1980, 94 Stat. 1021 (codified at 46 U.S.C. §§ 801, 814 (fifth paragraph), and 841c) ("MLAA"). We reverse.

FACTS

This case is part of the continuing struggle over mechanization and automation of cargo handling in the maritime shipping industry. Cargo handlnig was formerly labor intensive. With increased use of large, durable truck-and-trailer size shipping containers, the need for ILWU labor has decreased significantly.

Cargo was formerly brought to the docks in trucks. Each piece of cargo was taken from the truck, packed on pallets, and placed aboard the ship. Now most cargo is loaded into

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[1] The Pacific Maritime Association is an employer organization of over 100 principal common carriers by water, stevedoring contractors, and marine terminal operators, representing the Pacific Coast shipping industry. The primary function of the PMA is to negotiate and administer collective bargaining contracts with unions representing its members' employees, of which the International Longshoremen's and Warehousemen's Union is one.

large shipping containers either by freight handling companies or by the owners of the cargo. The containers are then trucked to the docks and loaded onto specially designed ships. When the ship reaches its destination, the process is reversed. The containers are off-loaded and taken either to cargo handling facilities or directly to the purchaser of the cargo for emptying. The result has been a tremendous increase in efficiency. While cargo tonnage shipped in containers during the last 25 years increased 800 percent, ILWU hours worked dropped 50 percent.

The only segment of the process which remains labor intensive is the loading and emptying of the containers—"stuffing and stripping" in industry parlance. The ILWU has not retained control over labor used in stuffing and stripping. While ILWU labor is still utilized on the docks, the trend has been to locate stuffing and stripping operations, called container freight stations ("CFSs"), away from the docks allowing the employment of non-ILWU labor. Because of the high costs of ILWU labor, approximately 75 percent of all west coast container stuffing and stripping is performed at off-dock, non-ILWU CFSs. Of course, nearly all containers, regardless of where stuffed or stripped, pass through ILWU hands. ILWU labor is used to operate the dockside machinery in placing the containers aboard ship and removing them at their destination.

In 1981 the PMA and ILWU completed an agreement covering a wide variety of issues. A part of this agreement, later designated by the FMC as LM-81, was a method of raising money to partially cover fringe benefit costs of PMA members who operate on-dock CFSs. The aim of

LM-81 was to retain existing work and recover work from non-ILWU off-dock CFSs.

Under LM-81 certain PMA members are to collect a fee from steamship lines ("carriers") by assessing each ton of containerized cargo loaded onto or discharged from vessels at west coast ports. The assessment is levied against all containers, whether stuffed and stripped at on-dock CFSs, off-dock CFSs, or by the shipper or consignee without the use of any CFS. The assessments are deposited in a fund. Periodic payments are made to PMA members who are on-dock, ILWU-manned CFS operators. The amount paid to each operator is based on the amount it has contributed to ILWU fringe benefit programs under a separate PMA-ILWU agreement which utilizes a man-hours worked computation.

The economic result is that a charge is levied against the carriers to help support on-dock CFS operations. The payments reduce the costs of on-dock CFSs, permitting them to reduce their prices. The on-dock CFSs are therefore better able to compete with the non-ILWU off-dock CFSs.

Petitioners, all off-dock CFS operators, objected to LM-81.

PROCEEDINGS BELOW

LM-81 was filed by the PMA and ILWU with the FMC. Pursuant to 46 U.S.C. § 814, the agreement was "deemed approved from filing" subject to review by the commission "upon complaint filed." Cal Cartage filed its complaint against PMA with the FMC. Soon after, Hawaiian Pacific and Containerfreight jointly filed a complaint against

PMA identical to Cal Cartage's. The complaints were consolidated and ILWU was granted leave to intervene by the administrative law judge ("ALJ").

The complaints alleged that LM-81 is a "maritime labor agreement" and not an "assessment agreement," and consideration of LM-81 was therefore outside the FMC's jurisdiction under the limitations of the Shipping Act, 46 U.S.C. § 814, *as amended by* the MLAA. The complaints alleged in the alternative that if LM-81 was properly before the FMC, LM-81 violated parts of 46 U.S.C. §§ 814, 815 and 816.

The ALJ concluded that LM-81 was outside the Commission's jurisdiction and not subject to the FMC's consideration. The full Commission reversed. It found that LM-81 was an "assessment agreement" as defined in section 814[2] and therefore was properly before the Commission. Petitioners do not challenge this ruling.

The Commission then considered whether the complaints raised sufficient allegations of Shipping Act violations to overcome PMA's arguments that the complaints failed to state a claim. It ruled that the complaints made out a claim under the Shipping Act against PMA's enforcement of LM-81.

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[2]46 U.S.C. § 814 gives the FMC jurisdiction over certain aspects of "assessment agreements." Such agreements are implicitly defined in the fifth paragraph of section 814, which provides that:

> Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission.

Finally, the Commission considered whether petitioners had standing to challenge an agreement to which they are not parties and under which they are not liable for assessments. The FMC ruled that petitioners lacked standing to sue because "[p]arties so removed from the operative effects of an assessment agreement are outside the classes of interests protected by the statute." The statute the FMC referred to is the Shipping Act, 46 U.S.C. § 801 *et. seq., as amended by* the MLAA.

Petitioners ask the court to reverse the FMC's order dismissing their complaints for lack of standing and to remand the case to the FMC for a decision on the merits of their Shipping Act claims.

STANDARD OF REVIEW

A reviewing court must set aside agency action found to be arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). This case involves the FMC's interpretation of a statute which the FMC has responsibility for implementing and for which the FMC actively lobbied when it was considered by Congress. "The interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute." *Miller v. Youakim,* 440 U.S. 125, 144, 99 S.Ct. 957, 968, 59 L.Ed.2d 194 (1979), *quoting Youakim v. Miller,* 425 U.S. 231, 235-36, 96 S.Ct. 1399, 1402, 47 L.Ed.2d 701 (1976). But the courts are the final authorities on issues of statutory construction. *Federal Trade Commission v. Colgate-Palmolive Co.,* 380 U.S. 374, 385, 85 S.Ct. 1035, 1042, 13 L.Ed.2d 904 (1965). We "are not obliged to stand aside and rubber-stamp . . . affirmance of administrative decisions. . . . " *National Labor Relations Board*

v. Brown, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965). "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia. . . . " *American Ship Building Co. v. National Labor Relations Board,* 380 U.S. 300, 318, 85 S.Ct. 955, 967, 13 L.Ed.2d 855 (1965).

DISCUSSION

The Shipping Act as amended by the MLAA provides a cause of action to challenge assessment agreements which have been filed with the FMC.

> The Commission shall, upon complaint filed . . . , disapprove, cancel, or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States.

46 U.S.C. § 814 (fifth paragraph).

The question is whether petitioners have standing to utilize this cause of action.

A. *Standing*

Under the Shipping Act, as amended, there is only a private cause of action to challenge assessment agreements. The FMC has been precluded from challenging assessment agreements on its own. *See* S.Rep. No. 854, 96th Cong., 2d Sess. 13, U.S.Code Cong. & Admin.News 1980, 2447 (1980). *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), and progeny are therefore inapplicable. Those cases create a test for determining whether any, rather than which, private party has a cause of action under a substantive statute.

Once it is determined that a private cause of action exists, the question of standing for a particular person is decided by judging

> whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question.

Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970). *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 475, 102 S.Ct. 752, 760, 70 L.Ed.2d 700 (1982).[3] The "zone of interests" test for standing is a generous one. One seeking standing need only assert an interest which is "arguably" within the zone protected by the statute. *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 153-54, 90 S.Ct. 827, 829-30, 25 L.Ed.2d 184 (1970); *Tax Analysts & Advocates v. Blumenthal,* 566 F.2d 130, 142 (D.C.Cir.1977), *cert. denied,* 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978). While the zone of interests test does not encompass every aspect of standing, *see Valley Forge,* 454 U.S. at 474-75, 102 S.Ct. at 759-60; *Fentron Industries v. National Shopmen Pension Fund,* 674 F.2d 1300, 1304 (9th Cir.1982), it is determinative with respect to the only aspect of standing relevant in this case.

B. *Legislative History*

Historically, the FMC held it did not have jurisdiction over maritime collective bargaining agreements under the

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[3]Petitioners' assertions that they have suffered "injury in fact" are insufficient to establish standing. While injury in fact is a crucial element of standing, petitioners must also satisfy the "zone of interest" test set out in text. *Valley Forge,* 454 U.S. at 474-75, 102 S.Ct. at 759-60; *Fentron Industries,* 674 F.2d at 1304.

Shipping Act of 1916, which required that certain maritime agreements be filed with and approved by the Commission. In 1968, however, the Supreme Court ruled that the FMC had too narrowly defined its jurisdiction under the Shipping Act. *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 390 U.S. 261, 277, 88 S.Ct. 929, 938, 19 L.Ed.2d 1090 (1968) ("Volkswagen"). As a result of *Volkswagen,* maritime collective bargaining agreements were required to go before the FMC for approval under the standards of the Shipping Act.

As a consequence of *Volkswagen,* collective bargaining in the maritime industry was seriously disrupted. The parties did not know whether they had made an agreement until the Commission approved it, usually following lengthy hearings and sometimes litigation. The maritime industry was thus deprived of the benefits of the national policy of free collective bargaining without governmental intervention. The results of *Volkswagen* met with criticism from nearly everyone in the maritime industry, whether labor or management, and including the FMC.

As a direct response to *Volkswagen,* Congress enacted the MLAA, which amended the Shipping Act. The purpose of the MLAA was essentially to restore the FMC to its pre-*Volkswagen* role, removing jurisdiction to regulate collective bargaining agreements. The MLAA made all collective bargaining and related agreements completely exempt from FMC jurisdiction under the Shipping Act, except for agreements for the funding of fringe benefits on other than a uniform man-hour basis—so called assessment agreements. The MLAA established a procedure for filing and, if there are complaints, review of these agreements by the

Commission. Retention of jurisdiction over assessment agreements was thought necessary to "ensure equal treatment of shippers, cargo and localities and to prevent abuses made possible by concerted activity of ocean carriers and others." S.Rep. No. 854 at 2 and 13, U.S.Code Cong. & Admin.News 1980, at 2448 (1980).

C. *Petitioners' Arguments*

Petitioners first argue that section 821 of the Shipping Act gives them standing to complain of the assessment agreement, unaffected by the changes to section 814 by the MLAA. Second, they argue that even if section 814 modifies section 821 with regard to standing, they are still within the "zone of interests" created by section 814's "detriment to commerce" test.[4]

(1) Sections 821 and 814.

Section 821 of the Shipping Act, both before and after the MLAA, permits anyone to raise claims of violations of the Shipping Act's substantive provisions with the FMC:

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[4]Petitioners also argue that Hawaiian Pacific was, for a time, a "shipper," and therefore has standing under section 814 even aside from the detriment to commerce test. Petitioners also raise an issue regarding standing to challenge the assessment agreement as a "matter required to be set forth in a tariff. . . ." *See* 46 U.S.C. § 821.

Neither of these contentions is properly before the court. Petitioners' argument that Hawaiian Pacific was a "shipper" was never raised before the FMC. Nor did petitioners challenge the conclusion of the ALJ that "none of the parties nor the evidence indicate the . . . [assessment agreement] invokes rates, charges, regulations or practices which are required to be set forth in a tariff." Issues not taken up before the agency are not properly raised on appeal. *See United States v. Tucker Truck Lines*, 344 U.S. 33, 37, 33 S.Ct. 67, 69, 97 L.Ed. 54 (1952); *Ducanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs*, 644 F.2d 827, 832 (9th Cir. 1981).

"Any person may file with the Federal Maritime Commission a sworn complaint setting forth any violation of this chapter. . . . " 46 U.S.C. § 821. This statement of standing is followed by procedures for filing such complaints. Section 821 also gives the FMC authority to initiate complaint proceedings on its own motion.[5] The FMC's power to initiate challenges to agreements does not extend to assessment agreements. *See* S.Rep. No. 854 at 13.

The MLAA amendments to the Shipping Act at section 814 created a separate procedure for challenging assessment agreements. Unlike other agreements which must be filed with the FMC,[6] assessment agreements are "deemed approved upon filing with the Commission."[7] 46 U.S.C. § 814. Section 814 also provides for remedies should the

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[5]"The Commission, upon its own motion, may in like manner and, with the same powers, investigate any violation of this chapter." 46 U.S.C. § 821(b).

[6]All other agreements which must be filed with the FMC require affirmative action by the Commission before approval is attained. Until approved, whether automatically in the case of assessment agreements or by affirmative action in the case of other agreements, implementation is unlawful. 46 U.S.C. § 814.

[7]Approval of an agreement has at least one significant collateral effect. Section 814 (sixth paragraph) provides that "[e]very agreement, modification, or cancellation lawful under this section . . . shall be excepted from provisions of the . . . [antitrust laws]." This provision has been interpreted to mean that agreements which are "approved" by the Commission are immune from antitrust challenges. *E.g., Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 216-17, 86 S.Ct. 781, 783-84, 15 L.Ed.2d 709 (1966).

No case has yet interpreted the antitrust immunity provision in the context of an automatically approved assessment agreement. We need not do so here. We note, however, that denial of standing to petitioners might well have the effect of conferring antitrust immunity on an agreement that violates the Shipping Act.

Commission decide an assessment agreement is either discriminatory or is a detriment to commerce.

None of the MLAA amendments indicate who may file complaints against assessment agreements. Petitioners argue that the generous standing provisions of section 821 remain effective for all Shipping Act challenges, including challenges to assessment agreements.

Rules of statutory construction hold that repeals by implication are not favored. Congress' intent to repeal an existing provision should be clear. *E.g., T.V.A. v. Hill,* 437 U.S. 153, 189, 98 S.Ct. 2279, 2299, 57 L.Ed.2d 117 (1978). "Only a clear repugnancy between the old . . . and the new [law] results in the former giving way. . . . " *United States v. Borden Co.,* 308 U.S. 188, 198-99, 60 S.Ct. 182, 188-89, 84 L.Ed. 181 (1939). In practical terms, this rule means that "in the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari,* 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974).

Congress, when enacting the MLAA, did not repeal or modify section 821 and did not specifically mention standing under section 814. Under rules of statutory interpretation, we must presume that standing is controlled by section 821.

The Commission reasoned that section 814 created a separate complaint procedure with implicit standing requirements more vigorous than section 821's. The Commission then looked to the clause of section 814 which reads: "[t]o the extent that any provision of this paragraph conflicts with the language of [821] or any other section of this

act . . . this paragraph shall control. . . . " The Commission ruled that section 814's implicit standing requirement preempted those specified in section 821.

The Commission's reliance on the preemption clause of section 814 is not persuasive. The clause refers to conflicts between provisions of 814 and 821. The two provisions are not in apparent conflict with regard to standing. The preemption clause was intended to give the FMC discretion to fashion appropriate remedies apart from the restrictions of the remedies provision of the unamended Shipping Act, including section 821. S.Rep. No. 854 at 14.[8] The legislative history does not suggest that the preemption clause was intended to affect the standing provision of section 821.

(2) Zone of Interests of Section 814.

Neither are we persuaded that section 814's substantive standards implicitly remove standing from all but carriers, shippers and ports. The FMC has authority to disapprove, cancel, or modify any assessment agreement which it finds to be "unjustly discriminatory or unfair as between carriers, shippers or ports, *or* to operate to the detriment of the commerce of the United States." 46 U.S.C. § 814 (emphasis added).

The statutory provision on its face gives the FMC authority over assessment agreements to prevent two kinds of harm. Petitioners do not, and could not, assert standing to contest LM-81 because it is allegedly discriminatory. Petitioners argue they have standing to contest LM-81 because

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[8] "The last sentence of . . . [section 814] is intended to give the Commission broad discretion, unfettered by the constraints of sections 18, 22 and other provisions of the Shipping Act, to fashion appropriate remedies for unfair or discriminating assessments." S.Rep. No. 854 at 14.

it is allegedly detrimental to commerce. We see nothing in the statute which restricts standing to enforce the standard upon which petitioners rely.[9]

The Commission argues that protections for the commerce of the United States may only be raised by carriers, shippers or ports. It reasons that antitrust considerations are beyond the scope of the Commissioner's jurisdiction, and injury to competitive position is therefore not contemplated by the detriment to commerce standard. It concludes that petitioners' complaint is based on an injury to their competitive position, and therefore they are not protected by the detriment to commerce standard and have no standing. Neither the FMC nor intervenors, however, suggest what values are to be protected by the detriment to commerce standard.[10]

There is some merit to the Commission's position. According to the legislative history:

> The primary reason for subjecting these agreements to FMC scrutiny upon complaint is to insure that all

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[9]The third element of the *Fentron* test is therefore satisfied: "In order to have standing to sue for violations of a federal statute, a plaintiff must: (1) suffer an injury in fact; (2) fall arguably within the zone of interests protected by the statute allegedly violated; and (3) show that the statute itself does not preclude the suit." *Fentron Industries*, 674 F.2d at 1304.

[10]We are presented only with the threshold question of standing and therefore need not attempt to give complete content to the detriment to commerce standard. While case law is vague, it is at least clear that detriment to commerce is a standard independent of other substantive standards of the Shipping Act. *See Aktiebolaget*, 390 U.S. at 244, 88 S.Ct. at 1009; *National Association of Recycling Industries, Inc. v. Federal Maritime Commission*, 658 F.2d 816, 827-28 (D.C.Cir.1980); *Federal Maritime Commission v. New York Terminal Conference*, 373 F.2d 424, 427-28 (1967).

> affected parties pay only their fair share of fringe benefit obligations. Antitrust considerations are not a factor to be weighed by the Commission in evaluating these agreements. . . .

S.Rep. No. 854 at 13-14.

While protection of those liable for assessments may have been the "primary" consideration, it was not the only consideration. Even though Congress wanted to eliminate consideration of pure "antitrust" factors, it does not necessarily follow that Congress wanted to eliminate consideration of all impacts an assessment agreement might have on competition. The legislative history indicates Commission jurisdiction over these agreements was necessary to "prevent abuses made possible by concerted activity of ocean carriers and others." S.Rep. No. 854 at 2 and 13, U.S.Code Cong. & Admin.News 1980, 2448. Antitrust law limitations do not encompass all possible impacts on competition that may result in a "detriment to commerce."

All agreements must be non-discriminatory as between carriers, shippers and ports, and must not operate to the detriment of commerce. All agreements except assessment agreements are subject to the additional requirement of not being "contrary to the public interest." *Compare* 46 U.S.C. § 814 (fifth paragraph) *with* § 814 (second paragraph). The "public interest" within the meaning of section 814 (second paragraph) includes the national policy embodied in the antitrust laws. *See Volkswagen,* 390 U.S. at 273-74, 88 S.Ct. at 936-37; *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 244-45, 88 S.Ct. 1005, 1009-10, 19 L.Ed.2d 1071 (1968). Under the MLAA Congress chose not to extend this requirement to

assessment agreements and eliminated the "public interest" standard with regard to such agreements. It does not follow that Congress also stripped away protections for the commerce of the United States whenever an assessment agreement also has anti-competitive effects.

Granting petitioners standing in this case will not defeat the purpose of the MLAA, as the Commission suggests. The MLAA was intended to restore order and some certainty to the collective bargaining process. S.Rep. No. 854 at 1. Becaue of *Volkswagen,* collective bargaining agreements and assessment agreements had to be approved by the FMC. Under the Shipping Act, such agreements were illegal until the FMC had specifically approved them. It was the delay in approval that disrupted labor relations. The MLAA eliminated the problem with regard to most collective bargaining agreements by exempting them from coverage under the Shipping Act. The MLAA also eliminated the problem with regard to assessment agreements by deeming them approved automatically upon filing. Granting standing to petitioners will not alter that. The assessment agreement will be operative unless and until the FMC specifically concludes it is a detriment to commerce.

Petitioners are well placed to raise the issue of an assessment agreement's detrimental impacts on commerce. Petitioners are parts of the system of carriers and freight handlers which facilitate the flow of goods. Had Congress left it within the power of the FMC to challenge assessment agreements on its own motion we might have assumed that there was no private right of action to enforce what appears to be a protection of the public's interests. As

enacted, the MLAA left it to private parties to enforce the detriment to commerce standard. We hold that petitioners, as part of the network that makes up waterborne commerce, are within section 814's zone of protected interests and have standing to challenge an assessment agreement under the detriment to commerce standard.

CONCLUSION

The FMC's interpretation of the Shipping Act, as amended, is unjustified in light of the rules of statutory construction, the legislative history of the MLAA, and the statutory language. The decision of the FMC is reversed and the case is remanded for consideration of the merits of petitioners' claims.

REVERSED AND REMANDED.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 83-7102

FMC Nos. 82-1, 82-10

California Cartage Company, Inc.,
Containerweight Terminals Company,
and Hawaiian Pacific Freight Forwarding,
Petitioners-Appellants,

vs.

United States of America and
Federal Maritime Commission,
Respondents-Appellees,

Pacific Maritime Association and
International Longshoremen's and
Warehousemen's Union,
Intervenors.

On Petition for Review of an Order of the
Federal Maritime Commission

ORDER

[Filed March 2, 1984]

Before: SKOPIL and PREGERSON, Circuit Judges, and MARQUEZ, District Judge*

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*The Honorable Alfredo C. Marquez, United States District Judge for the District of Arizona, sitting by designation.

The panel has voted to deny the petition for rehearing. Judges Skopil and Pregerson have voted to reject the suggestion for rehearing en banc, and Judge Marquez recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

Appendix C

Federal Maritime Commission

Docket No. 82-1

California Cartage Company, Inc.

vs.

Pacific Maritime Association

Docket No. 82-10

Containerfreight Terminals' Company, et al.

vs.

Pacific Maritime Association

(Served)
(January 31, 1983)
(Federal Maritime Commission)

REPORT AND ORDER

By the Commission: (Alan Green, *Chairman;* James Joseph Carey and James V. Day, *Commissioners*)*

This proceeding arose upon the filing of a complaint by California Cartage Company, Inc. (CalCartage) against the Pacific Maritime Association (PMA). Another complaint, raising the same factual and legal issues, was filed against PMA by Containerfreight Terminals Company (Containerfreight), Hawaiian Pacific Freight Forwarding (Hawaiian), and Richmond Export Service (Richmond). The International Longshoremen's and Warehousemen's

*Vice Chairman Thomas F. Moakley's concurring and dissenting opinion is attached.

Union (ILWU) intervened in the proceedings which were subsequently consolidated.

The complaints attack the legality of Section V of a PMA/ILWU agreement filed with the Commission on July 2, 1981, designated Agreement No. LM-81 (Agreement or LM-81). Implementation procedures for the Agreement were filed on September 29, 1981 and the Agreement was deemed approved by the Commission on October 8, 1981, pursuant to section 15, of the Shipping Act, 1916 (46 U.S.C. § 814).[1] The complaints allege that the Agreement violates sections 15, 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§ 814, 815 and 816), and, alternatively, that the Commission lacks jurisdiction over the Agreement. Should the Commission determine that it has jurisdiction, Complainants request that we issue a cease and desist order prohibiting further actions under the Agreement and order retrospective assessment adjustments.

Administrative Law Judge Joseph N. Ingolia (Presiding Officer) issued an Initial Decision (I.D.) on October 26, 1982, finding that Agreement No. LM-81 did not fall within the Commission's jurisdiction. PMA and ILWU have filed Exceptions to the Initial Decision. CalCartage has filed Replies to these Exceptions.[2]

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[1]The pertinent provision of section 15 is as follows:

> Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission.

[2]Containerfreight and Hawaiian also filed a Reply to Exceptions. However, this pleading, which was filed after its due date, merely adopts the CalCartage Replies to Exceptions and attaches a copy of Complainants' Reply Brief.

INITIAL DECISION

The Presiding Officer found that the Commission lacked jurisdiction over Agreement No. LM-81 because the Agreement does not expressly provide for the funding of fringe benefits. He held that the Commission's authority must be clearly and unambiguously indicated from the specific agreement which is the subject of a complaint. He added that any doubts should be resolved in favor of a finding of no jurisdiction.

The Presiding Officer characterized LM-81 as an assessment agreement which imposes a "tax" on containers and distributes these funds to ILWU-manned CFS stations in proportion to the man-hour assessments made under a previous assessment agreement, Agreement No. LM-80. He rejected arguments that the two agreements be read together and that, so read, the net economic effect was the funding of fringe benefits on other than a man-hour basis. Instead, he restricted his analysis to the provisions of LM-81 and found that its stated purpose and economic effect were to reverse the trend of CFS work leaving the on-dock facilities of PMA members. The Presiding Officer also found that the Agreement was conditional, in that if other PMA-ILWU "work preservation" agreements became operative, LM-81 would become null and void. This reinforced his determination that the Agreement was for cost reimbursement purposes and not for the funding of fringe benefits.

In reaching his jurisdictional finding, the Presiding Officer relied on the legislative history of the Maritime Labor

Agreements Act of 1980 (MLAA). [3]He found that the underlying purpose of this Act was to take the Commission out of the collective bargaining process by removing from its jurisdiction agreements which were the result of collective bargaining; that the MLAA subjects to Commission jurisdiction only those agreements which impose assessments to provide for the funding of fringe benefits, and only if those assessments are levied on an "other than man-hour basis;" and that Commission consideration of assessment agreements is for the limited purpose of determining the fairness of the assessments as between shippers, carriers and ports and whether those agreements are otherwise detrimental to commerce.

POSITIONS OF THE PARTIES

PMA

PMA argues that the Presiding Officer erred in confining his jurisdictional analysis to the literal language of LM-81 without regard to the economic result achieved by that Agreement's interaction with LM-80. It maintains that the Agreement need not *expressly* direct the payment of funds to a fringe benefit plan to fall within the Commission's jurisdiction if its effect is to shift cost allocations of a pre-existing agreement to an "other than man-hour" basis.

The Presiding Officer also allegedly erred in relying on the union motives underlying the Agreement and ignoring its economic effects. PMA contends that the "work preservation" motive does not alter the fact that the effect of the Agreement is to shift fringe benefit funding from a man-

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[3]The MLAA (P.L. 96-325, 94 Stat. 1021) modified sections 1 and 15 and added a section 45 to the Shipping Act, 1916 to provide for the separate treatment of maritime labor agreements.

hour assessment to a tonnage assessment. PMA states that LM-81 is not a limited fund, but is directly proportional to man-hour assessments under LM-80 and achieves a reallocation of costs within the container sector.

PMA also challenges the Presiding Officer's finding that the MLAA overruled *Volkswagenwerk.*[4] The MLAA allegedly removed only the "public interest" standard and the pre-implementation approval requirements of section 15 for collective bargaining agreements that did not fall within the then existing "labor exemption." PMA argues that the MLAA upheld the Commission's jurisdiction over assessment agreements and collectively bargained assessment agreements except those involving man-hour assessments. All other assessment agreements are said to be subject to the standards of section 15, fifth paragraph.

Exception is taken to many of the characterizations of the Agreement made by the Presiding Officer. Challenged is the Presiding Officer's finding that the conditional nature of LM-81 affects jurisdiction on the ground that the future expiration or shift in assessment methods does not affect jurisdiction over the current method. Moreover, that LM-80 funds fringe benefits allegedly does not alter the fact that LM-81 shifts the funding obligations and therefore itself "provides" for "funding" within the meaning of the MLAA.

PMA further argues that it was error for the Presiding Officer to compare the Agreement with other work preservation rules previously instituted by PMA but enjoined by the court. It insists that LM-81 is distinguishable in that it does not impose a tax only on non-ILWU stuffed contain-

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[4]*Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261 (1968).

ers, is not isolated to "hot cargo" and does not contain a "no subcontract" clause. PMA also challenges the finding that PMA "established" the CFS Program Fund Implementation Procedures. PMA claims that it only drafted these procedures, which themselves were the product of collective bargaining, agreed to by the ILWU.

Finally, PMA states that the Presiding Officer erred in failing to dismiss the subject complaints for failure to state a cause of action under the MLAA. It argues that the MLAA was intended only to provide a remedy for persons paying assessments, which Complainants here did not.

ILWU

ILWU argues that the Presiding Officer should have found that Complainants' wage and benefits rates are inferior to those provided by the ILWU-PMA contract, that container traffic has increased dramatically over the years and that ILWU productivity has also dramatically improved in the same period of time. On the other hand, the ILWU insists that it was error for the Presiding Officer to find that the CFS Program Fund was a "result" of the ILA Work Incentive Program. The Fund allegedly resulted from ILWU's own demand for a shift from a man-hour assessment to a tonnage assessment in order to preserve CFS work and accommodate PMA's demand for efficiency and productivity improvements at CFS stations.[5]

CalCartage

CalCartage notes that the Presiding Officer did not make a finding that the actual purpose of LM-81 was limited to

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[5]The balance of ILWU's Exceptions are basically the same as PMA's.

"work preservation." Therefore, it views the Initial Decision as not ruling out a finding in another forum that the intent of LM-81 was to capture work not previously done by the ILWU. CalCartage considers the ILWU's wage rate and container traffic growth exceptions to be irrelevant to the jurisdictional finding made in the Initial Decision. It also supports the Presiding Officer's finding that PMA established the CFS Program Fund.

CalCartage supports the Presiding Officer's jurisdictional determinations. It adds, however, that if the Commission reverses the Initial Decision and finds that it has jurisdiction over LM-81, it should also (1) find that Complainants have "standing" to sue under the MLAA, and (2) remand the proceedings for a decision on the merits.

CalCartage considers itself a "person" entitled to file a complaint under section 22 of the Shipping Act, 1916 (46 U.S.C. § 821) and therefore having the requisite "standing." It does not view the provisions of section 22 and those of the MLAA as being mutually exclusive. Allegedly, only the *remedies* of the two sections conflict, and this is no impediment here because Complainants seek only a cease and desist order and prospective assessment adjustments. CalCartage argues that it has suffered injury in fact and stands within the zone of protection of the MLAA.

Complainants allege that they are not arguing antitrust violations but rather violations of sections 15, 16 and 17 of the Shipping Act. It is argued that the criteria stated in *Volkswagenwerk* apply here and that PMA and ILWU have failed to show that the benefits inuring to those paying the assessments are proportional to the level of their assessment. CalCartage maintains that the assessments are

intentionally unrelated to the amount of ILWU man-hours utilized by the assessed entities. PMA and ILWU have also allegedly failed to put forward any justification for shifting fringe benefit obligations other than that of buying labor peace, which CalCartage views as being beyond the scope of FMC review under the MLAA. In the event it may be found to be within the scope, however, CalCartage adds that LM-81 does not meet the Commission's "labor exemption" and therefore traditional antitrust considerations would be relevant.

DISCUSSION

Jurisdiction

The Commission has determined that LM-81 falls within its jurisdiction over assessment agreements under the MLAA. In effect, LM-81 operates to impose an assessment for the funding of fringe benefits on other than a man-hour basis and is the proper subject of complaints under section 15, fifth paragraph of the Shipping Act, 1916. Accordingly, the Initial Decision issued in this proceeding will be reversed.

Admittedly, LM-81 does not by its terms provide for the funding of fringe benefits. LM-80 is the agreement which funds fringe benefits and imposes these funding obligations on PMA members, predominantly on a man-hour basis. However, LM-81 imposes a tonnage assessment on containerized cargo handled by PMA members and reimburses PMA's CFS operators on the basis of the man-hour assessments made under LM-80. The clear net effect of the two agreements, therefore, is to provide for fringe benefit funding by CFS operators on a tonnage rather than a man-hour basis.

Section 45 of the Shipping Act (46 U.S.C. § 841c) provides a broadly worded exemption from Shipping Act jurisdiction for "maritime labor agreements," except for those which provide "for the funding of fringe benefit obligations on other than a uniform man-hour basis." While the legislative history of the MLAA suggests that it was intended to provide a broad immunity from section 15 requirements for collective bargaining agreements,[6] the "assessment agreements" exception should not be read so narrowly as to exclude labor agreements from Commission jurisdiction merely because the agreement document itself does not contain an *express* provision providing for the funding of fringe benefits. Such an interpretation would lead to a result which is inconsistent with the legislative compromise reflected in the MLAA.

Several interests, including the Commission, had argued before Congress that those entities which bear the costs of maritime labor agreements should have a forum to hear complaints concerning the fairness and equity of the assessments made under those agreements.[7] A strict interpretation of the fringe benefit funding exception would largely defeat this purpose. It would in essence allow the drafters of assessment agreements to determine whether those bearing the assessments will have access to the Commission. Although this case does not involve such a situation because PMA, for its own reasons, seeks the Commission's assertion of jurisdiction and no parties paying assessments have filed a complaint, the possibility cannot be ignored. Jurisdictional determinations should

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[6]*See e.g.*, I.D. at 22; H.R. REP. NO. 96-876, 96th Cong., 2d Sess. 2.

[7]*See, e.g.*, S. REP. NO. 96-854, 96th Cong., 2d Sess. 10.

not depend on the motives and tactics of individual parties in a particular case.[8]

Ultimately, the meaning of a statute is determined by the language of the statute and the intent of Congress.[9] While the language of the statute is, of course, the first consideration in statutory construction,[10] the Commission will not interpret the MLAA in a manner which defeats its legislative purpose.[11] Any determination regarding Commission jurisdiction under the MLAA must take into consideration the purposes of the statute. The MLAA does not limit the scope of the Commission's jurisdictional inquiry to the specific wording of an "assessment agreement" document. Nor does it preclude a jurisdictional analysis based on the agreement's ultimate operation and economic effect. The Commission will therefore construe the MLAA in a manner that will best achieve its purposes. To this end, we find that LM-81 operates in a manner that Congress intended to be subject to Commission scrutiny, and accordingly falls within the jurisdiction conferred upon this agency by the MLAA.

Sufficiency of Complaints and Standing

PMA's Exceptions challenge the sufficiency of the complaints, the standing of Complainants[12] and the order in which these matters were addressed by the Presiding Officer.

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[8]*Swift & Co. v. Hocking Valley R. Co.*, 243 U.S. 281 (1917).

[9]*See, e.g., U.S. v. General Motors Corp.*, 518 F.2d 420, 438 (D.C. Cir. 1975).

[10]*Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976).

[11]*National R.R. Passenger Corp. v. National Ass. of R.R. Passengers*, 414 U.S. 453, 458 (1974).

[12]*See* PMA Exceptions at pp. 49-50.

We cannot find that the Presiding Officer erred in first addressing the question of jurisdiction.[13] Having found no jurisdiction there was no need for him to consider the legal sufficiency of the complaints or the right of Complainants to sue. Given the Commission's jurisdictional finding above, however, it now becomes necessary to address these two remaining threshold issues. Because these are essentially legal issues, not requiring the resolution of factual disputes, they can be considered by the Commission directly, without a remand to the Presiding Officer.

Sufficient allegations of possible Shipping Act violations exist to overcome arguments that the complaints should be dismissed on grounds of lack of legal sufficiency.[14] Complainants allege discrimination in the assessments and disbursements method of LM-81 and also allege that the charges assessed bear no reasonable relationship to the benefits obtained under the Agreement.[15] Apart from the question of standing, the complaints on their face therefore state a cause of action regardless of whether the standards ultimately found to govern the legality of the Agreement are limited to those of section 15, fifth paragraph, or also include those of sections 16 and 17.

Complainants' standing to bring an action under the MLAA in this proceeding turns upon whether the complaint procedures of section 22 of the Act apply. If they do, then Complainants must be found to have the requisite standing as they clearly come within the term "any per-

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[13]*See Jackson v. U.S.*, 428 F.2d 844, 847-848 (Ct. Cl. 1970).

[14]*See Carton-Print v. Austasia Container Express*, 20 F.M.C. 31, 33 (1977).

[15]Complaint of CalCartage at 8-9; Complaint of Containerfreight, et al., at 10-11.

son", as section 22 defines the universe of those entitled to file complaints under that section.[16] The MLAA itself is silent on whether section 22 governs causes of action arising under it. It does provide, however, that to the extent that its operative provision, *i.e.*, section 15, fifth paragraph, may conflict with section 22, the former shall control.[17] The question then becomes whether the complaint procedures of section 22, and, specifically, its liberal standing provision, are consistent with the provisions of section 15, fifth paragraph. We find that they are not.

A reading of the provisions of the MLAA, particularly that provision which added section 15, fifth paragraph, to the Shipping Act, and an examination of its legislative history convinces us that the MLAA contemplates a separate complaint procedure from that provided in section 22 of the Act. Section 15, fifth paragraph, has its own time limitation on both the filing of a complaint and issuing a decision, states substantive standards to be applied, and identifies available remedies.[18] That provision also expressly identifies the classes of entities intended to receive the protection of the statute against discriminatory or unfair assessments, to wit: "carriers, shippers, or ports." It would therefore appear to be inconsistent with the scheme of the MLAA to find that "any person", regardless of how remotely associated with a given assessment agreement, may utilize the carefully circumscribed complaint procedures of the MLAA.

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[16]*See F.M.C. v. Zim Israel Navigation Co.*, 263 F.Supp. 618 (S.D. N.Y. 1967); *Isthmian S.S. Co. v. United States*, 53 F.2d 251 (S.D. N.Y. 1931).

[17]46 U.S.C. § 814, paragraph 5; P.L. 96-325 § 4.

[18]*Id.*

This conclusion also comports with the overall legislative history of the MLAA. That history at various places speaks of affording "affected" or "aggrieved" parties the right to challenge assessment agreements.[19] Complainants might qualify as aggrieved parties if this were the only consideration determining standing under the statute.[20] However, the injury upon which Complainants rely as a basis for standing is not one that is addressed by the substantive requirements and affirmative remedies contained in the MLAA.

The overall purpose of the MLAA complaint procedure was to afford a forum to those who directly or indirectly pay assessments to challenge their fairness.[21] Section 15, fifth paragraph, permits the Commission to inquire whether an assessment agreement "operate[s] to the detriment of the commerce" or is "unjustly discriminatory or unfair as between shippers, carriers or ports." As so stated, section 15 clearly does not contemplate an inquiry into the impact of an assessment agreement on the competitive positions of other third parties. That antitrust considerations are beyond the scope of inquiry intended by section 15, fifth paragraph, is further indicated by the fact that the "public interest" standard, which embodies antitrust considerations and which governs the acceptability of *other* agreements under section 15, was intentionally not made applicable to assessment agreements.[22]

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[19]*See* S. REP. NO. 96-854, *supra* at 11.

[20]*See Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 138 (D.C. Cir. 1977).

[21]This is reflected not only in the legislative history of the MLAA, S. REP. NO. 96-854, *supra*, at 14, but also in the method established for providing remedies for successful complainants. *Id.*

[22]*See* S. REP. NO. 96-854, *supra*, at 14.

Complainants' alleged injury is not caused by an assessment obligation directly or indirectly placed upon them by the challenged Agreement. Rather, and at best, it is an economic effect of the assessment on their competitive standing vis-a-vis those who *are* subject to assessment obligations, *i.e.*, PMA members. Congress did not intend such a remote consequence to form the basis of a complaint seeking disapproval of a collectively bargained assessment agreement under the MLAA.[23] Parties so removed from the operative effects of an assessment agreement are outside the classes of interests protected by the statute, and, as such, not intended to be beneficiaries of its remedies.[24] The Commission therefore concludes that Complainants lack standing to file a complaint against LM-81 under section 15, fifth paragraph, of the Shipping Act, 1916.

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[23]Complainants do have available to them, however, section 22 complaint procedures against any matter required to be set forth in a tariff on file with the Commission which may be in violation of other sections of the Shipping Act, 1916. *See* 46 U.S.C. § 845; P.L. 96-325 § 5.

[24]*See* S. REP. NO. 96-854, *supra*, at 14. *Compare Association of Data Processing Service Org. v. Camp*, 397 U.S. 150, 154-155 (1970) *with Tax Analysts and Advocates v. Blumenthal*, *supra*, at 138-145.

THEREFORE, IT IS ORDERED, That the Exceptions to the Initial Decision filed by the Pacific Maritime Association and the International Longshoremans' and Warehousemans' Union are sustained to the extent indicated above and denied in all other respects;

IT IS FURTHER ORDERED, That the complaints filed in this proceeding are dismissed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued. By the Commission.

/s/ FRANCIS C. HURNEY
Secretary

Vice Chairman Moakley, concurring and dissenting.

I do not agree with the majority's conclusion that LM-81 is subject to the Commission's jurisdiction. However, assuming *arguendo,* that the agreement is subject to FMC jurisdiction, I concur with the majority that the complainants lack standing to bring these actions.

By enacting the Maritime Labor Agreements Act (MLAA), Congress succeeded in extracting this Commission from a very difficult position following the Supreme Court's *PMA* decision.[1] That decision was the culmination of a series of more and more expansive interpretations of the Commission's jurisdiction over labor agreements and left this Commission in the untenable posture of having to consider the Shipping Act ramifications of maritime collective bargaining agreements before they could be implemented.

At the Commission's urging, therefore, the 96th Congress was proposing to remove all collective bargaining and related agreements from the Commission's section 15 jurisdiction. However, certain shippers and ports raised concerns over the possibility of unfair and discriminatory assessments of fringe benefit obligations and the lack of protection from such assessments under other laws. Litigation over such assessments had been a prominent feature of the maritime labor scene for the decade prior to that legislation. Heeding these concerns, Congress carved out a narrow

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[1] *Federal Maritime Commission v. Pacific Maritime Association,* 435 U.S. 10 (1978).

class of labor agreements which would remain subject to limited FMC jurisdiction. This class was defined as:

> Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis . . . [2]

The agreement before us in this case, LM-81, clearly does not provide for the funding of collectively bargained fringe benefit obligations. It is only by combining the provisions of this agreement with another agreement, LM-80, which does provide for the funding of such benefits, that an argument can be made that the two agreements together meet the jurisdictional test. But, as the Administrative Law Judge articulated clearly in his initial decision, these two agreements are distinct, with separate lives and separate purposes. The assessment agreement to fund fringe benefits, LM-80, is in effect and will remain in effect no matter what happens to LM-81.[3]

Moreover, the Commission's jurisdiction to scrutinize such agreements is triggered only by *complaint*. Under the terms of the MLAA, the Commission cannot investigate assessment agreements on its own motion. Only LM-81 is the subject of the instant complaints.

I do not share the majority's concern that we would be leaving section 15 jurisdiction to the discretion of the drafter by declining jurisdiction over LM-81. Potential ex-

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[2]Public Law 96-325, 94 Stat. 1021, Sec. 4.

[3]Initial Decision at 45.

posure to antitrust penalties is sufficient incentive to discourage any cavalier disregard of section 15.

The majority's decision here expands that class of labor agreements which Congress left to our jurisdiction and leaves the door ajar for futher incursions into the labor field. This is exactly the PMA dilemma from which Congress extricated this Commission by enacting the MLAA. I therefore dissent from that portion of the majority order.

Appendix D

Maritime Labor Agreements Act of 1980

An Act to amend the Shipping Act, 1916, to exempt collective bargaining and related agreements from regulation by the Federal Maritime Commission.

94 Stat. 1021

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. That this Act may be cited as the "Maritime Labor Agreements Act of 1980".

Sec. 2. Section 1 of the Shipping Act, 1916 (46 U.S.C. 801) is amended by adding, at the end of that section, the following:

"The term 'maritime labor agreement' means any collective bargaining agreement between an employer subject to this Act, or group of such employers and a labor organization representing employees in the maritime or stevedoring industry, or any agreement preparatory to such a collective bargaining agreement among members of a multiemployer bargaining group, or any agreement specifically implementing provisions of such a collective bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group."

Sec. 3. The first paragraph of section 15 of the Shipping Act, 1916 (46 U.S.C. 814) is amended to read as follows:

"Sec. 15. Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete

memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions for such agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section".

Sec. 4. Section 15 of the Shipping Act, 1916, as amended, is further amended by inserting between the fourth and fifth paragraphs thereof, the following new paragraph:

"Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized, shall be deemed approved upon filing with the Commission. The Commission shall thereafter, upon complaint filed within 2 years of the date of filing of the agreement, disapprove, cancel, or modify

any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States. The Commission shall issue its final decision in any such complaint proceeding within 1 year of the date of filing of the complaint. To the extent that any assessment or charge is found, in such a complaint proceeding, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the unjust discrimination or unfairness for the period of time between the filing of the complaint and the final decision by means of assessment adjustments. Such adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded. To the extent that any provision of this paragraph conflicts with the language of section 22 or any other section of this Act, or of the Intercoastal Shipping Act, 1933, the provisions of this paragraph shall control in any matter involving assessment agreements described herein".

Sec. 5. Section 45 of the Shipping Act, 1916 (46 U.S.C. 842), and all references thereto, is redesignated section 46 and a new section is added as follows:

"Sec. 45. The provisions of this Act and of the Intercoastal Shipping Act, 1933, shall not apply to maritime labor agreements and all provisions of such agreements except to the extent that such provisions provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the

cargo handled or type of vessel or equipment utilized. Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act or of the Intercoastal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water or other person subject to this Act which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement".

Sec. 6. The changes made to existing laws by the provisions of this Act shall not affect any claims for reparation, if any, based upon conduct occurring prior to the date of enactment of this Act or formal Commission proceedings commenced prior to the date of enactment of this Act.

Approved August 8, 1980.

Appendix E

V. *CFS PROGRAM FUND*

The parties acknowledge their mutual interests in developing productive work opportunities that preserve for dockworkers their work and living standards. Such a program will retain and attract to the industry responsible, reliable and skilled persons whose availability will assure a stable workforce and will minimize the costs of those industry programs that are now required when work is unavailable.

The parties recognize that the continued movement of container work from the docks jeopardizes their aforesaid mutual interests. They desire to reverse that movement and encourage the establishment, development and growth of efficient and productive container freight stations on the docks to preserve the work which has historically been performed by the longshore workforce.

To achieve these ends they have agreed as follows:

(1) The employers will expend annually during the term of this contract approximately $3 million to be raised upon containerized cargo tonnage. (The reference to a dollar expenditure is not a cap upon the sum the employers may be required to expend annually to achieve the objectives of this program.) The funds shall be managed by PMA and distributed by it to those of its members who operate CFS facilities, such distribution to be on a basis which will encourage the preservation, growth and increase of such container stuffing and unstuffing facilities. PMA will report periodically to the Union on the receipts and disbursements of the Fund.

(2) The Union agrees that the working conditions, hours, guarantees, dispatching and other CFS employment conditions shall be those specified in the Container Freight Station Supplement, dated January 5, 1970. These provisions of the Container Freight Station Supplement shall not be burdened by past arbitration decisions or past practices whether oral or written. In short, any restrictions on the employer that are in conflict with the provisions of the Container Freight Station Supplement will be considered null and void.

(3) The parties agree CFS wages, vacations, holidays, health and welfare, pensions and other benefits shall be updated by the PCLCD and PCCCD first effective July 1, 1981.

(4) The parties will henceforth commit themselves to increasing CFS productivity and the elimination of wasteful work practices.

(5) The parties agree to set up a joint committee to report periodically to the Joint Coast Labor Relations Committee on the progress of this program and to make recommendations as to further implementation.

(6) Disputes which arise with respect to this program shall be first referred to the Joint Port Labor Relations Committee for the port where the dispute may arise and, if necessary, may be referred by either party to the Joint Coast Labor Relations Committee and then by either party to the Coast Arbitrator.

(7) This program may be terminated with the mutual written consent of the parties upon sixty (60) days written notice to all employers receiving distributions under this

program and, in all events, this program shall immediately terminate if the provisions of paragraphs 1.5 through 1.543 of the 1970-71 Container Freight Station Supplement and paragraphs 1.53, 1.54, 1.55 and 1.57 of the amended Container Freight Station Supplement that were entered into February 10, 1972 are determined to be legally enforceable.

(8) The parties shall put this program into appropriate form for filing with the necessary government agencies on or before October 1, 1981 and, upon such filing, this program shall be effective.

CFS PROGRAM FUND IMPLEMENTATION PROCEDURES

1. *General Description of CFS Program*

PMA will establish a Fund to implement Section V of the ILWU-PMA Memorandum of Understanding dated July 2, 1981. PMA will collect the Fund by assessing each ton of containerized cargo loaded or discharged from vessels in California, Oregon and Washington ports by or for PMA members.

The Fund will reimburse PMA member employers operating container stuffing and stripping facilities under the PCLCD and PCCCD for certain of the payments they have made to ILWU-PMA Benefit Plans. Reimbursements will be made by two types of payment: (1) an assessment credit called "A-Credit" paid on a monthly term, and (2) and incentive credit, called "I-Credit" paid on a more extended term.

2. *Definition of "CFS Hours"*

"CFS Hours" are hours worked for PMA member employers under the provisions of the Container Freight Sta-

tion Supplement to the PCLCD or hours worked by longshoremen or clerks in stuffing or stripping operations of containers under the provisions of either the PCLCD or the PCCCD. Such hours shall be identified and reported to PMA monthly in accordance with rules and procedures established by PMA.

3. *Definition of "Revenue Tons"*

"Revenue Tons" are defined as follows: (a) When ocean revenue is based on measurement, 40 cubic feet is considered one ton regardless of whether ocean revenue may have been determined on any other measurement basis; (b) When ocean revenue is based on weight, 2,000 pounds is considered one ton regardless of whether ocean revenue may have been determined on a long ton or any other weight basis; (c) Automobiles are to be reported always on the basis of 40 cubic feet to the ton regardless of how manifested; (d) Lumber and Logs are to be reported always on the basis of 1,000 board feet to the ton regardless of how manifested. Logs are to be converted to board feet using the Brereton Scale.

4. *Definition of "CFS Tons"*

"CFS Tons" are Revenue Tons stuffed into or stripped from containers by PMA member employers under the provisions of the PCLCD and PCCCD or the Container Freight Station Supplement thereto.

5. *Definition of "Tons of Containerized Cargo"*

"Tons of Containerized Cargo" are Revenue Tons shipped in any single rigid nondisposable unit designed to be used repeatedly for the carriage of cargo and having an outside measurement exclusive of lifting lugs or rings of not less than 175 cubic feet.

6. *CFS Program Tonnage Assessments*

PMA will determine and publish the assessment rate per ton of containerized cargo, such rate being that which will provide the amounts necessary to pay A-Credits and I-Credits in accordance with the provisions of Paragraphs 8 through 11 below. Further, PMA will determine and publish changes to the assessment rate per ton of containerized cargo whenever it deems that the amounts in the Fund may exceed or fail to meet the needs of the Fund and may make other adjustments in the CFS Program to secure its equitable operation. Tonnage Assessments will commence as of the first day of the payroll month following the month in which the CFS Program is filed with the Federal Maritime Commission (FMC).

7. *Assessment Credits*

An A-Credit is an amount equal to ninety percent (90%) of the sum of the hourly contribution rate paid on a CFS Hour by PMA member employers to meet ILWU-PMA Employee Benefit Costs but excluding that portion of the Vacation Benefit contribution rate deemed returnable to the contributing employer to pay vacation-related insurance and taxes. The hourly contributions for ILWU-PMA Employee Benefit Costs include, but are not limited to, the hourly contributions for pensions, welfare, holidays, vacations, pay guarantees and voluntary travel. PMA will calculate the amount of an A-Credit, adjusting it appropriately whenever the hourly contribution rates for employee benefits are changed.

8. *Payment of A-Credits*

An A-Credit will be paid to the reporting PMA member employer for each CFS Hour reported. Accrual of A-Cred-

its shall commence on the first day of the third payroll month following the calendar month in which the CFS Program is filed with the FMC and shall be made promptly following the close of each payroll month for which CFS Hours were reported to PMA. A-Credits will be paid from the Fund.

9. *Incentive Credits*

The total of I-Credits for any period will be equal to eleven point eleven eleven percent (11.1111%) of the sum of all A-Credits payable for the period. Thus, the sum of A-Credits and I-Credits for the period will equal the amount of total hourly Employee Benefit Contributions for PMA member employers' CFS Hours for the period but excluding the certain Vacation Benefit Contributions described above.

10. *Payment of I-Credits*

I-Credits will be paid following the close of the 1982 payroll year and the close of each payroll year thereafter. A separate calculation will be made for each of the four PMA administrative areas; Washington, Oregon, Northern California and Southern California. The total of I-Credits will be determined for each area based upon the A-Credits paid to PMA member employers for CFS Hours worked in the area during the period for which I-Credits are to be paid. The total I-Credits for an area will be allocated to the PMA member employers of the area on the basis of the CFS Tons reported to PMA by such employers during the period for which I-Credits are to be paid, so that each such employer's share of I-Credits will be the same proportion of the total I-Credits for such period for the area as such employer's CFS Tons bear to the total CFS Tons for the

area for the period, except as follows: if an employer's I-Credits exceed twenty-two point twenty-two percent (22.22%) of his A-Credits for such period, his I-Credit payments will be twenty-two point twenty-two percent (22.22%) of his A-Credits, and the I-Credits of other employers of the area will be redetermined in accordance with the above formula but with the CFS Tons and I-Credit payments of the "exceeding" employer excluded from the amounts used in making the determination for other employers.

11. *Effective Date*

The CFS Program shall become effective as of the date it is filed with the FMC and will continue until modified by PMA.

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JUN 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1960

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

INTERNATIONAL LONGSHOREMEN'S AND
WAREHOUSEMEN'S UNION
AND PACIFIC MARITIME ASSOCIATION,
Petitioners,

VS.

UNITED STATES OF AMERICA, FEDERAL MARITIME
COMMISSION, CALIFORNIA CARTAGE COMPANY, INC.,
CONTAINERFREIGHT TERMINALS COMPANY, AND
HAWAIIAN PACIFIC FREIGHT FORWARDING,
Respondents.

SUPPLEMENTAL BRIEF ON PENDING PETITION FOR CERTIORARI PURSUANT TO U.S. SUPREME COURT RULE 22.6

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Come now Petitioners and pursuant to U.S. Sup. Ct. Rule 22.6, 28 U.S.C. hereby file this supplemental brief to call the Court's attention to its decision in *John R. Block, Secretary of Agriculture, et al., petitioners v. Community Nutrition Institute, et al.*, No. 83-458, ... U.S. ....., 52 U.S. Law Week 4697 decided on June 4, 1984, after the petition herein had been filed.

1. In the petition it was argued that because the Maritime Labor Agreements Act of 1980, 94 Stat. 1021 (codified at 46 U.S.C. §§ 801, 814 and 841c) ("MLAA") expressly gives a cause of action to "carriers, shippers or ports" to attack assessment agreements as discriminatory or detrimental to commerce, it precludes such an attack by others. (Ptn. 16-19; 28-29).

In *Block* this Court adopted this precise analysis. The statute therein involved (the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 et seq.) ("the Act") provided for review of market milk orders only by dairy producers and milk handlers. It did not provide for participation by consumers in the review process.

> [T]he omission of such a provision is sufficient reason to believe that Congress intended to foreclose consumer participation in the regulatory process. ..... U.S. at .....; 52 U.S. Law Week at 4698.

While

> [t]he general purpose sections of the Act allude to general consumer interests [,] . . . the preclusion issue turns ultimately on whether Congress intended for *that class* to be relied upon to challenge agency disregard of law . . . . The structure of this Act indicates that Congress intended only producers and handlers, and not consumers, to ensure that the statutory objective would be realized. ..... U.S. at .....; 52 U.S. Law Week at 4698-4699 (emphasis supplied).

So here, the structure of MLAA indicates that Congress intended only carriers, shippers or ports, and no others, to ensure that the statutory objectives would be realized.

2. The Court of Appeals for the District of Columbia Circuit, whose judgment was reversed in *Block*, had noted that there was "no legislative history or statutory language [which] directly and specifically supported the preclusion of consumer suits". ..... U.S. at .....; 52 U.S. Law Week at 4699. This is precisely the approach the Ninth Circuit took in granting standing to respondent companies in the instant case. (Ptn. 26-29).

This Court, however, held that the presumption favoring judicial review "may be overcome by inferences of intent drawn from the statutory scheme as a whole".

> In particular, at least when a statute provides a detailed mechanism for judicial consideration of particular issues *at the behest of particular persons*, judicial review of those issues *at the behest of other persons* may be found to be impliedly precluded. ..... U.S. at .....; 52 U.S. Law Week at 4699 (emphasis supplied).

This Court thus rejected the view of the Court of Appeals that to preclude review there had to be "unambiguous proof" of congressional intent to that effect. Rather, it found such congressional intent to be "fairly discernible" in the detail of the legislative scheme.

> Congress simply did not intend for consumers to be relied upon to challenge agency disregard of the law. ..... U.S. at .....; 52 U.S. Law Week at 4700.

By a parity of reasoning, Congress simply did not intend in MLAA for competitors outside the bargaining unit which are neither carriers, shippers nor ports to be relied upon

to challenge an assessment agreement as detrimental to commerce.

3. Finally, this Court observed that preclusion of consumer suits will not threaten the objectives of the statute since there is a class who can be expected to challenge unlawful agency action. ..... U.S. at .....; 52 U.S. Law Week at 4700. So here, there is a class who can be expected to challenge assessment agreements if they are detrimental to commerce—as indeed the Port Authority of New York and New Jersey has already done. (Ptn. p. 11-12, n.11).

This Court's decision in *Block* is an additional authority for the granting of the writ.[1]

San Francisco, California
June 15, 1984

Respectfully submitted,

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[1]Subsequent to the filing of the petition herein, West Publishing Company reported the decision of the Court of Appeals for the Eleventh Circuit holding that the Service Contract Act of 1965, 41 U.S.C. 351-353 ("SCA") did not authorize a private action despite plaintiffs contention "that there is nothing in the legislative history of SCA that indicates that Congress meant to exclude private actions. . .". *District Lodge No. 166 v. TWA Services*, 731 F.2d 711, 714 (11 Cir., 1984). Compare Ptn. 26-29.

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No. 83-1960

In the Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Section 15 of the Shipping Act of 1916, 46 U.S.C. (& Supp. V) 814, requires ocean common carriers and marine terminal operators serving them to file with the Federal Maritime Commission (FMC) agreements among themselves affecting competition. To the extent the Commission approves such agreements, they are exempt from the operation of the antitrust laws (*ibid.*).

By the Maritime Labor Agreements Act of 1980 (MLAA), Pub. L. No. 96-325, §§ 3, 4, 94 Stat. 1021 (codified at 46 U.S.C. (Supp. V) 814) (Pet. App. A38-A40), Congress terminated the FMC's Section 15 jurisdiction over all collective bargaining contracts and interemployer agreements implementing such contracts, except to the extent such agreements impose assessments to "provide for the funding of collectively bargained fringe benefit obligations on other

than a uniform man-hour basis" (46 U.S.C. (Supp. V) 841c). Under the MLAA, assessment agreements that remain subject to Section 15 are deemed approved upon filing, but the Commission shall upon complaint disapprove any that it finds to be "unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States" (46 U.S.C. 814). The MLAA amendments to Section 15 further provide that in case of conflict between its provisions and any other section of the Shipping Act with respect to assessment agreements, "the provisions of this paragraph shall control" (*ibid.*).

The agreement at issue in this case — designated "LM-81" by the FMC — is an assessment agreement negotiated by petitioners International Longshoremen's and Warehousemen's Union (ILWU) and Pacific Maritime Association (PMA), a multiemployer bargaining organization. LM-81 reduces the financial burden of funding certain employee fringe benefit programs for PMA members who operate dockside "container freight stations," sites at which shipping containers are "stuffed" and "unstuffed" by deep-sea longshoremen represented by the ILWU (Pet. App. A44-A48).

Respondents California Cartage Company, Container-freight Terminals Company, and Hawaiian Pacific Freight Forwarding, each of which operates container freight stations off the docks with employees not represented by the ILWU, protested the agreement as unlawful under the MLAA. After hearing, an FMC administrative law judge issued an initial decision concluding that LM-81 is not an "assessment agreement" over which the Commission has jurisdiction under the MLAA (Pet. App. A21-A22). On administrative appeal, the Commission found that LM-81 *was* an assessment agreement (*id.* at A27-A29), but did not reach the merits because it held that the protestants did not have standing under the MLAA — an Act it construed "to

afford a forum to those who directly or indirectly pay assessments to challenge their fairness," and not to those who challenge "an assessment agreement [because of its adverse impact] on the competitive positions of * * * third parties" (*id.* at A32 (footnote omitted)). The Commission concluded that application of the broad standing provision of Section 22(a) of the Shipping Act, 46 U.S.C. (Supp. V) 821(a), which allows "[a]ny person" to file a complaint (*ibid.*), would "appear to be inconsistent with the scheme of the MLAA" (Pet. App. A31).

The court of appeals reversed the Commission (Pet. App. A17). It held that Section 22 gave the protestants standing, finding that the standing provision of Section 22 did not clearly conflict with the MLAA and that Congress did not intend to circumscribe the application of Section 22 (Pet. App. A12-A13). Alternatively, the court found that Section 15's "detriment to commerce" standard protected competitive interests such as protestants' and independently conferred standing by bringing them within the "zone of interests" protected by the MLAA (Pet. App. A13-A17).

2. The United States and the FMC defended the Commission's decision in the court of appeals and will do so again in this Court if certiorari is granted. However, because of supervening legislation, the legal issue presented by the Petition no longer has continuing importance for the administration of the maritime laws. The case thus does not merit further review.

On March 20, 1984 — after the court of appeals' decision — the President signed into law the Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67 *et seq.* Section 5(d) of the Act (98 Stat. 71), which governs all labor-related assessment agreements filed with the Commission after June 17, 1984 (§ 21, 98 Stat. 90), provides that: "Except for this subsection and section 7(a) of this Act [granting antitrust immunity], this Act, the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, do not apply to assessment

agreements" (§ 5(d), 98 Stat. 72). Thus, the liberal standing provisions of Section 22(a) of the Shipping Act of 1916, 46 U.S.C. (Supp. V) 821(a), and its cognate provisions under the 1984 Act, cannot be applied under the new Act. According to the Joint Conference Committee Report: "Under existing law and under both bills, the remedies and regulatory standards applicable to assessment agreements are intended to be exclusive. In making this explicit, the conferees have reconciled the two versions to preclude any inference that the many new and restated provisions in the bill respecting rate, conference, and terminal regulation are also to be applied to assessment agreements." H.R. Conf. Rep. 98-600, 98th Cong., 2d Sess. 30 (1984).

Moreover, the new Section 5(d) omits the "detriment to commerce" standard which the court of appeals had held to protect the protestants here. Under the new Act, assessment agreements may be disapproved only if they are "unjustly discriminatory or unfair as between carriers, shippers, or ports" (§ 5(d), 98 Stat. 71). In addition, the legislative history indicates that "assessment adjustments" — which are useful only to those who, unlike protestants, pay assessments — are to constitute the exclusive damage remedy under the Act.

Because Congress has effectively overruled the court of appeals prospectively, the questions presented here are unlikely to arise in the future. See Shipping Act of 1984, § 20(e)(2), 98 Stat. 90. This decision affects only the parties to the immediate litigation, and is of insufficient importance to warrant review by this Court. See, *e.g.*, *Cook* v. *Hudson*, 429 U.S. 165, 165-166 (1976) (per curiam) (certiorari dismissed because of supervening state statute); *Rice* v. *Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70, 74 (1955) (same); *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1984